Supreme Court, U.S.
FILED
07-225 AUG 17 2007
OFFICE OF THE CLERK

Supreme Court of the United States

STATE OF LOUISIANA,

Petitioner,

vs.

RICKY JOSEPH LANGLEY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court of Louisiana

PETITION FOR WRIT OF CERTIORARI

CARLA S. SIGLER
Assistant District Attorney
Counsel of Record
JOHN F. DEROSIER
District Attorney
CYNTHIA S. KILLINGSWORTH
SHARON DARVILLE WILSON
Assistant District Attorneys
CALCASIEU PARISH DISTRICT ATTORNEY'S OFFICE
1020 Ryan Street
Lake Charles, LA 70601
Telephone: (337) 437-3400
Facsimile: (337) 433-8387

[illegible]

QUESTIONS PRESENTED

1. Whether the Louisiana Supreme Court erred in ruling that the absence of the trial judge during critical stages of the trial proceedings does not amount to a fatal structural error, despite the fact that the defendant successfully argued on direct appeal that it was in fact such an error?

2. Whether the Louisiana Supreme Court erred in determining that federal principles of double jeopardy barred a retrial of the defendant for capital murder when the defendant successfully argued on direct appeal that the trial judge's absence essentially deprived him of a trial, rendering the resultant verdict an absolute nullity?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinion Below 1

Statement of Jurisdiction 2

Constitutional and/or Statutory Provisions Involved ... 3

Statement of the Case 4

Statement of the Facts 6

Reasons for Granting the Writ 7

I. The Louisiana Supreme Court erred in ruling that the absence of the trial judge during critical stages of the trial proceedings does not amount to a fatal structural error, despite the fact that the defendant successfully argued on direct appeal that it was in fact such an error.... 7

II. The Louisiana Supreme Court erred in determining that federal principles of double jeopardy barred a retrial of the defendant for capital murder when the defendant successfully argued on direct appeal that the trial judge's absence essentially deprived him of a trial, rendering the resultant verdict an absolute nullity 11

Conclusion 15

Appendix Opinion of the Louisiana Supreme Court ....App. 1

Opinion of Third Circuit Court of Appeal ... App. 24

TABLE OF AUTHORITIES

Page

CASES:

Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305 (1984) 13

Arizona v. Poland, 476 U.S. 147, 106 S.Ct. 1749 (1986) 13

Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710 (1993) 9, 10

Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852 (1981) 12, 13

Caspari v. Bohlen, 510 U.S. 383, 114 S.Ct. 948 (1994) 13, 14

Gomez v. United States, 490 U.S. 858, 109 S.Ct. 2237 (1989) 8, 9, 11

Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045 (1987) 9

Green v. United States, 355 U.S. 184, 78 S.Ct. 221 (1957) 12

Johnson v. United States, 520 U.S. 461, 117 S.Ct. 1544 (1997) 9, 10

Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827 (1999) 9

Sattazhan v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732 (2003) 14

State v. Langley, 95-1489 (La. 4/14/98), 711 So.2d 651 4

State v. Langley, 95-1489 (La. 04/03/02), 813 So.2d 356 ..... 4, 13

TABLE OF AUTHORITIES – Continued

Page

State v. Langley, 04-269 (La.App. 3 Cir. 12/29/04), 896 So.2d 200 ..... *passim*

State v. Langley, 2006-1041 (La. 5/22/07), 958 So.2d 1160 ..... 5, 15

Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927) 9, 10

CONSTITUTION:

U.S. Const. amend. V 3, 15

STATUTES:

18 U.S.C. §3771 4

28 U.S.C. §1257 ..... 2, 3

LSA-R.S. 14:30 4

LSA-R.S. 46:1844 4

OTHER AUTHORITIES:

BLACK'S LAW DICTIONARY 1543 (8th ed. 2004) 10

PETITION FOR WRIT OF CERTIORARI

The petitioner, the State of Louisiana, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Louisiana Supreme Court. The Louisiana Supreme Court held that under federal constitutional law and United States Supreme Court jurisprudence, it was harmless error when the trial judge was absent from critical phases of the trial proceedings. The state high court further ruled that despite the defendant's successful argument to an intermediate state appellate court that this absence constituted structural error and meant that he had no trial, federal principles of double jeopardy still barred his retrial for first degree murder.

OPINION BELOW

On May 22, 2007, the Louisiana Supreme Court ruled that a trial judge is a dispensable part of a criminal trial. (App. 1-23). In so doing, the highest state court misinterpreted the United States Supreme Court's prior decisions regarding structural and harmless trial error. The state court also ignored the fact that the defendant had obtained a third murder trial by arguing that structural error occurred during the trial judge's absence at trial, then retracted that same position once he had obtained the desired result – a new trial – from the state intermediate appellate court. This case raises important questions about the definition of a criminal trial, what constitutes structural versus harmless trial error, the nature of double jeopardy, and the right of both the State and the defendant to a fair trial.

STATEMENT OF JURISDICTION

On May 22, 2007, the Louisiana Supreme Court issued a final judgment which conflicts with this Court's precedents regarding federal constitutional law as it relates to the issues of double jeopardy and trial and structural error. Pursuant to 28 U.S.C. §1257, the jurisdiction of this Honorable Court is invoked. This Court has the authority to review decisions of the highest state court when those rulings are based on the interpretation and application of federal constitutional law.

At the state court level, the respondent initially relied on both the federal constitution and United States Supreme Court case law to obtain a new trial, and then later he used them to repudiate the legal consequences of his successful appellate efforts. The Louisiana Supreme Court based its final decision on its misinterpretation of federal constitutional law and its misapplication of the United States Supreme Court's jurisprudence regarding structural error, harmless trial error, and double jeopardy. (App. 1-23). The state intermediate appellate court, the Louisiana Third Circuit Court of Appeal, had previously ruled consistently with this Court's decisions on those topics. (App. 24-51). The petitioner submits that this Honorable Court should grant its certiorari petition to remedy the Louisiana Supreme Court's lack of consideration for and adherence to this Court's prior, binding precedents on structural versus trial error and double jeopardy.

CONSTITUTIONAL AND/OR STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. §1257 provides in pertinent part as follows:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

The defendant was indicted by a grand jury located in Calcasieu Parish, Louisiana, for the first degree murder of six-year-old J.G.,[1] an offense committed in violation of LSA-R.S. 14:30. The defendant has been tried for first degree murder on two previous occasions. *State v. Langley*, 95-1489 (La. 4/14/98), 711 So.2d 651; *State v. Langley*, 95-1489 (La. 04/03/02), 813 So.2d 356; *State v. Langley*, 04-269 (La.App. 3 Cir. 12/29/04), 896 So.2d 200. The State has consistently sought the death penalty as the defendant's punishment. At the defendant's first trial, the jury recommended that he receive a death sentence. *Langley*, 711 So.2d at 656.

Before his second trial for first degree murder, the defendant pleaded not guilty and not guilty by reason of insanity. *State v. Langley*, 04-269 (La.App. 3 Cir. 12/29/04), 896 So.2d 200, 202. (App. 24). The trial judge was absent from critical portions of the defendant's second murder "trial." At its conclusion, the jury returned a verdict finding the defendant guilty of second degree murder.

The defendant subsequently appealed his conviction to the Louisiana Third Circuit Court of Appeal. On appeal, he claimed that the trial judge's absence from portions of his trial constituted structural error which essentially nullified the proceedings and mandated his conviction's reversal. The defendant's argument was based on federal constitutional law and United States Supreme Court jurisprudence. The Third Circuit agreed with the defendant's assessment of

---

[1] The petitioner uses the victim's initials in this brief to comply with LSA-R.S. 46:1844(W), and out of deference for the federal equivalent to Louisiana's victims' rights law, 18 U.S.C. §3771(a)(8).

error, and it declared that the defendant's trial and conviction were absolutely null. *State v. Langley*, 04-269 (La.App. 3 Cir. 12/29/04), 896 So.2d 200, 207-212. (App. 24-51). The defendant's case was then remanded to the district court level for retrial. *Langley*, 896 So.2d at 212. (App. 43-47).

After the Third Circuit's decision, the State declared its intention to retry the defendant for first degree murder. The defendant subsequently filed a Motion to Quash the Charge of First Degree Murder. On October 31, 2005, a state trial court hearing was held on the defendant's motion to quash. At the conclusion of that hearing, the state trial court judge ruled in the defendant's favor. He held that the State could not retry the defendant for first degree murder, nor could it seek the death penalty against him.

The State subsequently filed an application for a supervisory writ of review with the Louisiana Third Circuit Court of Appeal. The State's writ application was granted by that court, and the defendant's subsequent rehearing application was denied by it. The defendant then filed a writ application with the Louisiana Supreme Court seeking the reversal of the Third Circuit's writ grant decision; the State timely responded to his pleading.

On September 15, 2006, the Louisiana Supreme Court granted the defendant's writ application for briefing purposes. Additional briefs were ordered by the state high court. On May 22, 2007, the Louisiana Supreme Court reversed the Third Circuit's decision based on its own flawed interpretation of federal constitutional law and the United States Supreme Court jurisprudence on structural error, harmless error, and double jeopardy. *State v. Langley*,

2006-1041 (La. 5/22/07), 958 So.2d 1160. (App. 1-23). The State now seeks the review and reversal of the Louisiana Supreme Court's decision by this Honorable Court.

STATEMENT OF THE FACTS

The testimony and record evidence, combined with the defendant's detailed confession, revealed the following information: On February 7, 1992, the defendant was staying with the Lawrence family in a rural area of Calcasieu Parish, Louisiana. He had been previously convicted and incarcerated for child molestation in the state of Georgia. He was on parole for that offense; in fact, he was a parole violator when he stayed with the Lawrences.

Six-year-old J.G., a neighboring child, went to the Lawrence home to play with the two Lawrence children. The children were not at home. The defendant, who was alone in the house, was.

The defendant invited the child inside the home to wait for the Lawrence children's return. As the young boy played in the children's bedroom, the defendant went into the room, molested him, and strangled him to death. He hid the child's body in a closet, and covered him with a dirty blanket.

Later that same day, when the victim's mother came to the Lawrence home looking for her son, the defendant pretended to assist in the search for him. After law enforcement officers discovered that the defendant was a convicted child molester who was in violation of his Georgia parole, they questioned him about the missing child. The defendant ultimately confessed to his crime. He gave

a detailed videotaped confession in which he led law enforcement officers on a tour of the Lawrence home, described the murder to them, and subsequently brought them to the child's lifeless body, which he had hidden away in a bedroom closet.

REASONS FOR GRANTING THE WRIT

I. The Louisiana Supreme Court erred in ruling that the absence of the trial judge during critical stages of the trial proceedings does not amount to a fatal structural error, despite the fact that the defendant successfully argued on direct appeal that it was in fact such an error.

On the defendant's direct appeal of his second murder conviction, he specifically argued that the absence of the trial judge from portions of *voir dire* and closing arguments constituted fatal structural error which rendered the trial itself a nullity. Quite simply, the defendant maintained that the trial judge's absence was such a fundamental defect that in essence *he had no trial*. *State v. Langley*, 2004-269 (La.App. 3 Cir. 12/29/04), 896 So.2d 200, 203-206. (App. 24, 26-37). The Louisiana Third Circuit Court of Appeal, relying on this Honorable Court's jurisprudence regarding structural versus harmless trial error, agreed with the defendant's characterization of the trial judge's absence. *Langley*, 896 So.2d at 207-210. (App. 37-47). The Third Circuit noted that the trial judge's actions in leaving the courtroom constituted structural error which "destroyed the framework of the trial itself." *Langley*, 896 So.2d at 210. (App. 42).

The Louisiana Supreme Court's opinion is quite the opposite of the state intermediate court's well-reasoned, legally sound decision. (App. 1-23). It blithely ignores this Court's obligatory guidelines as to what constitutes structural error and what is considered harmless trial error. (App. 8-17). It is further defective in its misinterpretation of this Court's double jeopardy decisions. (App. 17-21).

The Louisiana Supreme Court actually ruled that under the United States Supreme Court's jurisprudence regarding structural versus harmless trial error, the absence of the trial judge was a harmless trial error. (App. 8-17). The fundamental effect of the Louisiana Supreme Court's decision: a ruling from the highest state court misinterpreting both federal constitutional and jurisprudential law by holding that a trial judge *is a dispensable part of a criminal trial*. This ruling contradicts this Court's previous decisions regarding not only the categories of error in a criminal trial, but also the very nature of trial.

In *Gomez v. United States*, 490 U.S. 858, 109 S.Ct. 2237 (1989), the United States Supreme Court noted that *voir dire* was a critical stage in a criminal proceeding. *Gomez*, 490 U.S. at 873, 109 S.Ct. at 2246. In *Gomez*, this Court recognized the vital importance of a judge's presence at and actions in presiding over *voir dire* in a criminal trial. According to this Court, a trial judge's absence from *voir dire cannot* be considered harmless error. When the trial judge in this case left the courtroom during *voir dire* (*and* closing arguments), the ensuing error was of such magnitude *that it destroyed the trial itself*.

In *Gomez*, the United States Supreme Court also stated that the defendant's "'right to an impartial adjudicator, be it judge or jury'" is among the fair trial rights

which are not susceptible to harmless error review. *Gomez*, 490 U.S. at 876, 109 S.Ct. at 2248, quoting *Gray v. Mississippi*, 481 U.S. 648, 668, 107 S.Ct. 2045, 2057 (1987). The *Gomez* Court declared: "Equally basic is a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside." *Gomez*, 490 U.S. at 876, 109 S.Ct. at 2248. In *Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544 (1997), the United States Supreme Court noted that a structural error, or a defect impacting the trial's framework, has only been found in a limited number of cases, *including one in which an impartial trial judge was lacking*. *Johnson*, 520 U.S. at 468-469, 117 S.Ct. 1544, 1549-1550, citing *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437 (1927). In this case, for two critical phases of trial – *voir dire* and closing arguments – the impartiality of the judge officiating over the criminal proceeding was not at issue. Instead, his very *presence* at the proceeding *was*.

In *Neder v. United States*, 527 U.S. 1, 14, 119 S.Ct. 1827, 1836 (1999), the United States Supreme Court stated: "Under our cases, a constitutional error is either structural or it is not." The *Neder* Court also noted that trial before a biased judge had previously been found to be one of the limited cases of structural error, thus mandating automatic reversal of the conviction. *Neder*, 527 U.S. at 8, 119 S.Ct. at 1833. The United States Supreme Court earlier made the distinction between structural and harmless trial error unmistakably clear in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710 (1993), when it stated:

> Trial error "occur[s] during the presentation of the case to the jury," and is amenable to harmless-error analysis because it "may. . . . be quantitatively assessed in the context of other

> evidence presented in order to determine [the effect it had on the trial]." *Arizona v. Fulminante*, 499 U.S. 279, 307-308, 111 S.Ct. 1246, 1264, 113 L.Ed.2d 302 (1991). At the other end of the spectrum of constitutional errors lie "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id.* at 309, 111 S.Ct., at 1265. The existence of such defects – deprivation of the right to counsel, for example – requires automatic reversal of the conviction because they infect the entire trial process. See *id.*, at 309-310, 111 S.Ct., at 1265. Since our landmark decision in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), we have applied the harmless-beyond-a-reasonable-doubt standard in reviewing claims of constitutional error of the trial type.

Brecht, 507 U.S. at 629-630, 113 S.Ct. 1710, 1717.

Under this Court's precedents, the lack of an impartial trial judge is a *fatal structural error*. *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437 (1927); *Johnson v. United States*, 520 U.S. 461, 117 S.Ct. 1544 (1997). *A fortiori*, the *complete lack* of a trial judge must also be fatal structural error. When the Louisiana Supreme Court held otherwise, it not only improperly interpreted and applied federal constitutional law and this Court's jurisprudence, but it further offended the integrity of the judiciary by essentially ruling that a judge – without whom there is no "trial" in the commonly understood sense of the word – is a superfluous part of a criminal trial.[2]

---

[2] Trial is defined as "A formal judicial examination of evidence and determination of legal claims in an adversary proceeding." BLACK'S LAW DICTIONARY 1543 (8th ed. 2004). In this case, there was no

(Continued on following page)

II. The Louisiana Supreme Court erred in determining that federal principles of double jeopardy barred a retrial of the defendant for capital murder when the defendant successfully argued on direct appeal that the trial judge's absence essentially deprived him of a trial, rendering the resultant verdict an absolute nullity.

This Court has issued numerous decisions on the topic of double jeopardy. However, none of those opinions is either legally or factually identical to this one. Despite this fact, the State notes the following decisions of interest.

In *Gomez v. United States*, 490 U.S. 858, 109 S.Ct. 2237 (1989), this Court notably stated that in a criminal trial, double jeopardy is at issue when the jury is "empaneled and sworn." *Gomez*, 490 U.S. at 872, 109 S.Ct. at 2246. In this case, the trial judge first left the courtroom during *voir dire*, *before* a jury was finally selected. *State v. Langley*, 2004-269 (La.App. 3 Cir. 12/29/04), 896 So.2d 200, 203-206. (App. 27-30). The trial framework was destroyed by his initial absence. As this Court noted in *Gomez*, *voir dire* is so vitally important to the trial framework that a trial judge must preside over it, since "no transcript can recapture the atmosphere of the *voir dire*, which may persist throughout the trial." *Gomez*, 490 U.S. at 875, 109 S.Ct. at 2247.

The petitioner submits that once the trial judge left the courtroom during *voir dire*, the trial ceased to exist. It became an absolutely nullity, as the framework of the trial

---

"judicial examination" for substantial parts of the trial because of the trial judge's absence from the proceedings.

was so structurally deficient by the *complete absence of a presiding official* that it could not fairly be considered a trial. The defendant argued as much on direct appeal. (App. 24-37). His assertion was correct. *The consequence*: no double jeopardy bar prevents the defendant's retrial for first degree murder.

In *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221 (1957), the United States Supreme Court held that when a defendant was charged with first degree murder and the jury found him guilty of second degree murder, double jeopardy barred his retrial for first degree murder. In *Green*, the United States Supreme Court noted that the defendant had been placed "in direct peril of being convicted and punished for first degree murder at his first trial." *Green*, 355 U.S. at 190, 78 S.Ct. at 225. In this case, as the Louisiana Third Circuit Court of Appeal so aptly noted in its direct appeal decision, this defendant was never in jeopardy at his second "trial." *State v. Langley*, 04-269 (La.App. 3 Cir. 12/29/04), 896 So.2d 200, 210-211. (App. 43-47).

In *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852 (1981), the United States Supreme Court held that when a capital sentencing jury recommended a sentence of life imprisonment, upon retrial a defendant may not be sentenced to death without violating double jeopardy. The *Bullington* Court stated that when a particular sentence is imposed, it does not operate as an "acquittal" of a more severe sentence. The Court reiterated that there is no absolute double jeopardy prohibition against a harsher sentence being imposed at a retrial after a successful defense appeal. *Bullington*, 451 U.S. at 437-438, 101 S.Ct. at 1857-1858. The *Bullington* Court noted that the real distinction in the case was based on the special nature of a

capital sentencing hearing, which specifically required the jury to choose between two possible sentences. *Bullington*, 451 U.S. at 438, 101 S.Ct. at 1858. A similar result was reached by the United States Supreme Court in *Arizona v. Rumsey*, 467 U.S. 203, 104 S.Ct. 2305 (1984). Of course, in this case there was no capital sentencing proceeding, so the jury never made such a sentencing choice.[3]

In *Arizona v. Poland*, 476 U.S. 147, 106 S.Ct. 1749 (1986), the United States Supreme Court held that there is no double jeopardy bar to a new capital sentencing proceeding when an appellate court finds the evidence insufficient to support one aggravating factor, but not for the death penalty. The Court noted that for double jeopardy purposes, the proper inquiry is whether or not the sentencer or appellate court found that the prosecution had not proved its case that the death penalty was appropriate. *Poland*, 476 U.S. at 155-156, 106 S.Ct. at 1755. This defendant has *never* received a final ruling after a full and complete capital trial that the death penalty is not a suitable punishment for him.

In *Caspari v. Bohlen*, 510 U.S. 383, 114 S.Ct. 948 (1994), the United States Supreme Court stated that its previous decisions had generally held that a sentence does not afford the same double jeopardy protection as an acquittal. *Caspari*, 510 U.S. at 391-392, 114 S.Ct. at 954-955. The Court reiterated that its decisions in *Bullington* and *Rumsey*, which might seem to indicate otherwise, were based on the "unique circumstances of a capital

---

[3] The State refers to the case which existed *after* the defendant was re-indicted for first degree murder pursuant to the Louisiana Supreme Court's order *State v. Langley*, 95-1489 (La. 04/03/02), 813 So.2d 356

sentencing proceeding." *Caspari*, 510 U.S. at 392, 114 S.Ct. at 954. In this case, there was no such hearing.

In a more recent case, *Sattazhan v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732 (2003),[4] the United States Supreme Court addressed the issue of whether or not the death penalty could be sought on retrial when a capital murder defendant was sentenced to life imprisonment. The life sentence was imposed because the jury could not agree on a sentence. The United States Supreme Court held that double jeopardy was no bar to the State seeking the death penalty at a retrial. The *Sattazhan* Court notably stated:

> Where, as here, a defendant is convicted of murder and sentenced to life imprisonment, but appeals the conviction and succeeds in having it set aside, we have held that jeopardy has not terminated, so that the life sentence imposed in connection with the initial conviction raises no double-jeopardy bar to a death sentence on retrial.

Sattazhan, 537 U.S. at 106, 123 S.Ct. at 737.

The United States Supreme Court further elaborated that its previous decisions "made clear that an 'acquittal' at a trial-like sentencing phase, rather than the mere imposition of a life sentence, is required to give rise to double-jeopardy protections." *Sattazhan*, 537 U.S. at 107, 123 S.Ct. at 737. In this case, no sentencing hearing was ever held at this defendant's second "trial." There has been *no effective trial* at which the defendant was acquitted of

---

[4] The Louisiana Third Circuit Court of Appeal specifically cited this case with approval in its decision. *Langley*, 896 So.2d at 211. (App. 44-45)

either first degree murder or a death sentence, either in fact or by implication.

Despite this fact, the Louisiana Supreme Court relied on this Court's jurisprudence and the Fifth Amendment of the U.S. Constitution to conclude that double jeopardy barred the defendant's retrial for first degree murder. (App. 17-21). The state high court's decision was also based on its misinterpretation of this Court's case law regarding structural and harmless trial errors. (App. 3-17). The highest state court in Louisiana has incorrectly interpreted and applied this Court's jurisprudence regarding two topics of fundamental importance in criminal law: the nature of appellate error and double jeopardy. That incurably flawed decision is now published law. *State v. Langley*, 2006-1041 (La. 5/22/07), 958 So.2d 1160. As such, it will be binding precedent on Louisiana state courts unless this Honorable Court remedies it. The petitioner respectfully requests that this Court do so, since the decision made in this case by the Louisiana Supreme Court will adversely impact many others throughout the state of Louisiana.

CONCLUSION

The Louisiana Supreme Court erred in its reversal of the state intermediate appellate court. That court correctly interpreted and applied both federal constitutional law and the United States Supreme Court's precedents on error and double jeopardy. This case raises important questions about issues such as error and double jeopardy. At its core, it calls into question the very nature of a trial, and it raises the issue of whether or not a trial judge is an

expendable part of that proceeding. The petitioner respectfully requests that this Honorable Court grant its certiorari request and remedy the serious legal errors made by the Louisiana Supreme Court in rendering a published, binding state court decision which so clearly contradicts many of those issued by this Court.

Respectfully submitted,

CARLA S. SIGLER
Assistant District Attorney
1020 Ryan Street
Lake Charles, LA 70601
Telephone: (337) 437-3400
Facsimile: (337) 433-8387

958 So.2d 1160

Supreme Court of Louisiana.
STATE of Louisiana
v.
Ricky Joseph LANGLEY.
No. 06-KK-1041.

May 22, 2007.

Clive A. Stafford Smith, Phyllis E Mann, Alexandria, Christine M. Lehmann, for Applicant.

Charles C. Foti, Jr., Attorney General, John F. DeRosier, District Attorney, Carla S. Sigler, Cynthia S. Killingsworth, Sharon D. Wilson, Frederick W. Frey, Assistant District Attorneys, for Respondent.

Ellis Paul Adams, Jr., for Louisiana District Attorneys Association, Amicus Curiae.

Robert Stephen Glass and G. Benjamin Cohen, for Louisiana Association of Criminal Defense Lawyers, Amicus Curiae.

John Howard Holdridge and Katherine Schwartzmann, for American Civil Liberties Union, Amicus Curiae.

JOHNSON, Justice.

We granted certiorari in this capital murder case to determine whether the defendant, Ricky Joseph Langley, who was charged with first-degree murder, but was found guilty of the lesser-included offense of second degree murder, may be retried for first degree murder following reversal of his conviction.

PROCEDURAL HISTORY

Langley was indicted by a grand jury for first degree murder, in violation of LSA-14:30. He was convicted in 1994 of first degree murder and sentenced to death. On appeal, this Court affirmed his conviction and sentence, but on application for rehearing, remanded the case to the trial court for evidentiary proceedings concerning the validity of the grand jury indictment and Langley's claim of intentional discrimination in the selection of grand jury foreperson. *State v. Langley,* 1995-1489 (La.4/14/98), 711 So.2d 651, *reh'g granted in part* (La.6/19/98). On remand, the trial court granted Langley's motion to quash the indictment and vacated his conviction and sentence. This Court upheld that judgment on appeal by the state. *State v. Langley,* 1995-1489 (La.4/3/02), 813 So.2d 356 ("*Langley I*").

Langley was re-indicted on a charge of first degree murder, to which he pleaded not guilty and not guilty by reason of insanity. Due to overwhelming pretrial publicity, the jury was selected from Orleans Parish, but the case was tried in Calcasieu Parish, where the sequestered jury was housed for the duration of the trial proceedings. After trial by jury, the jury rejected Langley's insanity defense and convicted him of the lesser included offense of second degree murder, a violation of LSA-14:30.1. Langley was then given the mandatory sentence of life imprisonment at hard labor.

On appeal, Langley argued, *inter alia,* that the temporary absences of the trial judge from the courtroom during portions of the voir dire examination of prospective jurors, and during closing arguments of counsel, constituted a structural defect in the proceedings, exempt from harmless-error analysis, which required reversal of his conviction and

sentence. The court of appeal agreed that "the errors committed by the trial judge, in absenting himself from the proceedings and failing to maintain decorum, were structural errors requiring reversal of the Defendant's conviction without a showing of actual prejudice." *State v. Langley,* 2004-0269, p. 15 (La.App. 3 Cir. 12/29/04), 896 So.2d 200, 210 ("*Langley II*").

In *Langley II,* a majority of the panel further concluded that the structural defects not only constituted reversible error, but also rendered the jury's verdict absolutely void, resulting in neither a conviction for second degree murder, nor an acquittal of first degree murder. The appellate opinion held that the state could exercise its plenary discretion over the subsequent conduct of the prosecution pursuant to LSA-C.Cr.P. art. 61, and could retry relator for capital murder, thereby exposing the Defendant once again to the prospect of the death penalty. *Langley,* 2004-0269 at 18-19, 896 So.2d at 211-12 ("[T]he verdict resulting from structural error [is] a nullity. . . . The necessary consequence of such a verdict is retrial, as though no verdict had been reached.").

Chief Judge Thibodeaux dissented from that portion of the majority opinion, considering the remarks about the nullity of the verdict both advisory and ill-advised, given that Langley had asked the court of appeal to review only his conviction of second degree murder for error, and not his acquittal of first degree murder. *Langley,* 2004-0269 at 1-2, 896 So.2d at 212-13 (Thibodeaux, C.J., dissenting in part and concurring in part) ("We must remember that it is the defendant who appealed. None of the fifteen assignments of error asserted by the defendant deal with the effect of an absolutely null verdict. . . . [T]he majority's opinion clearly states that: '[t]he question to be resolved is

whether the trial judge's conduct constitutes trial error, which is subject to review for harmless error, or structural error, which defines analysis by harmless error standards.' . . . Nothing more and nothing less.").

After the state re-indicted Langley for first degree murder, he moved to quash the indictment. The trial court granted the motion, limiting the state to retrial of the defendant for second degree murder only. The court considered that retrial for first degree murder would violate Langley's protections against double jeopardy and penalize him for his success on appeal by forcing him to endure another capital prosecution.

The state sought review. The court of appeal granted the state's writ, holding that its earlier pronouncements in *Langley II* regarding the absolute nullity of the defendant's prior conviction were not dicta, but were binding on the lower court as the "law of the case." *State v. Langley*, 2005-1475 (La.App. 3 Cir. 4/5/06), 925 So.2d 778 (Table) ("*Langley III*"). This court granted Langley's writ to review the correctness of that decision.[1]

LAW AND ANALYSIS

The defendant contends that the court of appeal's ruling violated the federal and state constitutional prohibitions against double jeopardy by allowing the state to proceed with a charge of first degree murder on retrial when the defendant has previously been acquitted of first degree murder. The defendant also contends that the court

---

[1] *State v. Langley*, 2006-1041 (La.9/15/06), 936 So.2d 1251.

of appeal violated the right to appeal found in the Louisiana Constitution.

The state contends that the prohibitions against double jeopardy found in the federal and state constitutions do not prohibit retrial of Langley on a charge of first degree murder. The state argues that, because the defendant's conviction of the lesser-included offense of second degree murder was set aside on the basis of a structural defect in *Langley II,* that trial was rendered void *ab initio.* The state asserts that the void trial is akin to one which is "illegally constituted" pursuant to La.C.Cr.P. art. 595, and that Langley cannot be considered as having been previously placed in jeopardy such that double jeopardy principles are violated by his re-indictment on charges of first degree murder.

Law of the Case Doctrine

Although neither the state nor the defendant sought review of the court of appeal's judgment in *Langley II,* this court is not prevented from reviewing the court of appeal's prior reasoning, particularly when that reasoning results in subsequent consequences now before the court. In *Langley II,* the court of appeal found that structural error occurred in Langley's trial, which error was not subject to an analysis for harmless error and which rendered his trial absolutely null. Although the appellate court found itself unable to revisit that reasoning in *Langley III* under the doctrine of "law of the case," this court is not similarly constrained. The law of the case principle "is not applied to prevent a higher court from considering the correctness of a ruling by an intermediate appellate court." *Levine v. First Nat. Bank of Commerce,* 2006-0394 p. 3, n. 4

(La.12/15/06), 948 So.2d 1051; *Pumphrey v. City of New Orleans*, 2005-0979 p. 7 (La.4/4/06), 925 So.2d 1202, 1207. Although this issue usually arises after this court has denied supervisory writs, and the case returns, there is no reason that the same principles of law would not be equally applicable in this case. As stated by Justice Tate in *Day v. Campbell-Grosjean Roofing & Sheet Metal Corp.*, 260 La. 325, 256 So.2d 105, 107 (La.1972), most recently cited in *Pumphrey, supra:*

> . . . the law-of-the-case principle is applied merely as a discretionary guide: Argument is barred where there is merely doubt as to the correctness of the former ruling, but not in cases of palpable former error or so mechanically as to accomplish manifest injustice. Further, the law-of-the-case principle is not applied so as to prevent a higher court from examining the correctness of the ruling of the previous court.

Although the *fact* of the reversal of Langley's conviction for second degree murder is not before the court, the court of appeal's reasoning which resulted in the reversal and remand must be reviewed in light of the double jeopardy implications of that trial.

We turn now to a review of the court of appeal's reasoning which invalidated Langley's conviction of second degree murder.

Analysis of Court of Appeal's Reasoning

The principal question raised by Langley on the direct appeal of his conviction for second degree murder was whether the error he asserted, the absence of the trial

judge from portions of his trial, rose to a level which would require reversal of his conviction.

In *Arizona v. Fulminante,* 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), the Supreme Court distinguished between structural defects in a criminal trial and all other errors committed during the course of the proceedings. The Court thereby sought to clarify when harmless-error analysis is appropriately conducted by an appellate court (for trial error) and when it is not (structural defect). As to the latter class of error, "structural defects in the constitution of the trial mechanism . . . defy analysis by 'harmless-error' standards . . . [because they] affect the framework within which the trial proceeds, rather than simply [interject] an error in the trial process itself." *Fulminante,* 499 U.S. at 310, 111 S.Ct. at 1265; *see also Brecht v. Abrahamson,* 507 U.S. 619, 629-30, 113 S.Ct. 1710, 1717, 125 L.Ed.2d 353 (1993) ("The existence of such [structural] defects . . . requires automatic reversal of the conviction because they infect the entire trial process.").

Structural defects occur in only "a very limited class of cases," and include the total deprivation of the right to counsel, lack of an impartial trial judge, unlawful exclusion of grand jurors of the defendant's race, deprivation of the right to self-representation at trial, the right to a public trial, and erroneous reasonable doubt instructions. *Johnson v. United States,* 520 U.S. 461, 468-69, 117 S.Ct. 1544, 1549-50, 137 L.Ed.2d 718 (1997); *Neder v. United States,* 527 U.S. 1, 7-8, 119 S.Ct. 1827, 1833, 144 L.Ed.2d 35 (1999); *United States v. Stevens,* 223 F.3d 239, 244 (3rd Cir.2000); *see also State v. Ruiz,* 2006-1755 p. 6 (La.4/11/07), 955 So.2d. 81.

In *Langley II,* the court of appeal found that the trial judge's absences from the bench and his failure to maintain courtroom decorum were structural defects or errors requiring reversal of the defendant's second degree murder conviction without the necessity of Langley showing that he was actually prejudiced. *Langley,* 2004-269 p. 15, 896 So.2d at 210. However, our review of the court of appeal's reasoning, and the federal cases upon which it relied, show interpretive errors on the part of the court of appeal in its characterization of the trial judge's absence as a structural defect.

Gomez v. United States

The court of appeal cited to *Gomez v. United States,* 490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989) as authority for finding that the trial judge's absence during voir dire was an error that "impinge[d] on the foundation of the trial, *i.e.* jury selection, and affect[ed] the framework on which the entire proceedings [were] built." *Langley,* 2004-269 p. 13, 896 So.2d at 208.

In *Gomez,* the Supreme Court answered in the negative the question whether a federal magistrate presiding at the selection of a jury in a felony trial without the defendant's consent was among the "additional duties" that district courts could assign to magistrates under the Federal Magistrates Act. The Supreme Court harbored "serious doubt" that a district judge could review a magistrate's determinations on voir dire, acknowledging that a court must scrutinize not only the words spoken by prospective jurors but also their gestures and attitudes. *Gomez,* 490 U.S. at 874-875, 109 S.Ct. at 2247-2248.

The *Gomez* court found that specific prejudice need not be shown in a situation where a magistrate, and not a district judge, conducted the voir dire. The Supreme Court found that "among the basic fair trial rights that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury." *Gomez,* 490 U.S. at 876, 109 S.Ct. at 2248 (internal citations omitted). The Supreme Court went on to conclude, applicable to the case before it, that "[e]qually basic is a defendant's right to have all critical stages of a criminal trial conducted **by a person with jurisdiction to preside**. Thus harmless-error analysis does not apply in a felony case in which, despite the defendant's objection and without any meaningful review by a district judge, **an officer exceeds his jurisdiction by selecting a jury**." *Id.*(Emphasis added).

Far from standing for the proposition that a harmless-error analysis does not apply to a situation where a judge is absent for a part or all of voir dire, and that this is a structural error, *Gomez* stands for the proposition that a critical part of trial may not be conducted by a person without jurisdiction to preside. A conviction obtained in a court of improper jurisdiction is, without doubt, a null conviction. For example, if a capital trial was held in a mayor's court, any resulting conviction would be absolutely null and void because the mayor's court, and the mayor presiding, do not have jurisdiction over the matter.

The main holding in *Gomez* is inapplicable in this case, where trial was conducted by a judicial officer with proper jurisdiction. The fact that the trial judge was not present for a portion of the trial is a trial error which

should have been reviewed to determine whether the error was harmless beyond a reasonable doubt.[2]

U.S. v. Mortimer

With regard to the trial judge's absence during closing arguments, the court of appeal relied on *U.S. v. Mortimer,* 161 F.3d 240 (3rd Cir.1998) to find that structural error occurred. Yet an examination of *Mortimer* shows that it cannot be relied on in this context, either. In *Mortimer,* the judge, who had been present during the prosecutor's summation, was absent from the defense's closing argument. The judge's absence was noted when the prosecutor made an objection, only to withdraw it with the exclamation, "The judge is not here." *Id.,* 161 F.3d at 241. The judge gave no notice to counsel or the jury of his absence. He was back on the bench in time to thank defense counsel for her speech, and to call on the prosecutor for rebuttal.

The federal appellate court found that, under the facts presented, structural error occurred during trial. This definitive statement is footnoted, however, to note that one of the three judges deciding the case, Chief Judge Becker, believed that the preferable manner of deciding the case was under the harmless error standard. Although Chief Judge Becker was satisfied that the patent error involved here was clearly not harmless beyond a reasonable doubt, he believed that under the facts of this case, the label "structural" was not inappropriate. *Mortimer,* 161 F.3d at 241 fn. 1.

---

[2] It is unnecessary for us to determine whether the trial error was harmless beyond a reasonable doubt, as the fact of the reversal of the defendant's conviction is not now before this court.

The federal appellate court then cited *Gomez,* with the same language relied upon by the court of appeal in this case:

> A trial consists of a contest between litigants before a judge. When the judge is absent at a "critical stage" the forum is destroyed. *Gomez v. United States,* 490 U.S. 858, 873, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989). There is no trial. The structure has been removed. There is no way of repairing it. The framework "within which the trial proceeds" has been eliminated. *See Arizona v. Fulminante,* 499 U.S. 279, 309-310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The verdict is a nullity. *Gomez,* 490 U.S. at 876, 109 S.Ct. 2237 (1989). *Mortimer,* 161 F.3d at 241.

From the facts of *Gomez,* discussed *supra,* we know that when the Supreme Court states that a trial is a contest between litigants before a judge, this means before a judge and not a magistrate. When a person other than a person with jurisdiction presides at a critical stage of trial, "the forum is destroyed," "there is no trial," and "the structure has been removed." *Gomez* was speaking to jurisdictional deficiencies.

That the *Mortimer* court did not believe that a true structural error occurred can be seen in its subsequent language. The federal appellate court continued: "We cannot, of course, anticipate every circumstance under which the judge's absence may destroy the structure." *Mortimer,* 161 F.3d at 241. In other words, the federal court was conceding that there are circumstances in which a trial judge's absence from the bench may be harmless. This is not the type of error, impacting the trial from beginning to end, that was contemplated as a "structural

error" by the Supreme Court. Although *Mortimer* considers other cases where a judge's absence was consented to by the parties and another where a trial judge's absence was extremely brief, the federal appellate court held that prejudice did not need to be shown.

It is beyond doubt that the federal appellate panel believed the error committed in that case to have been very serious. But the same result, *i.e.* reversal of the conviction and remand for a new trial, could have been achieved by finding the trial error to not be harmless beyond a reasonable doubt under a harmless error analysis. However, the federal appellate panel did acknowledge that the error there was not recognized by the Supreme Court as a structural error. The federal appellate court's use of the term "structural" to describe the error, as noted in the footnote, and their reliance on the inapposite *Gomez,* serves instead to emphasize the court's extreme disapproval of the trial judge's conduct.

Riley v. Deeds

Finally, the court of appeal relied upon *Riley v. Deeds,* 56 F.3d 1117 (9th Cir.1995). In *Riley,* the trial judge could not be located when, during jury deliberations, the jury requested that the victim's testimony be read back to them. In the trial judge's absence, court was conducted by his law clerk. The law clerk informed the jury that the victim's testimony would be read to them and that the foreman should indicate at which point the jury had heard enough. After the victim's direct examination was read, the jury foreman indicated the jury had heard enough. The

Riley court found the trial judge's absence to be an error of constitutional magnitude.[3]

The federal appellate court found that the presence of a judge is at the "very core" of the constitutional guarantee of trial by an impartial jury and was a proposition "so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion." *Riley*, 56 F.3d at 1119 (citing *Capital Traction Co. v. Hof*, 174 U.S. 1, 13-14, 19 S.Ct. 580, 585-586, 43 L.Ed. 873 (1898)[4]). Once again, the only uncontested proposition in this context is that a person having jurisdiction to preside over a trial must do so, and not a person without jurisdiction. In *Riley*, the law clerk presided over part of the trial by making evidentiary rulings in the absence of the trial judge. Thus, a jurisdictional defect occurred which required reversal.

We find that, just as with *Gomez*, the court of appeal again relied improperly upon a case concerning jurisdictional defects to support its erroneous conclusion that a structural error occurred.

---

[3] As previously stated, "all constitutional errors are not structural and indeed, most are amendable to harmless error analysis." *State v. Jones*, 2005-226 p. 4 (La.2/22/06), 922 So.2d 508, 511.

[4] In *Capital Traction Co.*, relied upon by *Riley*, the question was whether, in the District of Columbia, a justice of the peace could preside over a jury trial for a civil action to recover damages in the amount of $300 and whether that would constitute a "trial by jury." The Supreme Court held that a trial by a jury of twelve persons before a justice of the peace was not a trial by jury within the meaning of the common law and of the seventh amendment to the constitution. Consequently, a trial of facts by a jury before the justice of the peace would not prevent those facts from being reexamined *de novo* by a jury in the appellate court. *Id.*, 174 U.S. at 45-46, 19 S.Ct. at 597.

Structural Defect or Trial Error

As previously mentioned, the Supreme Court has recognized structural error in a very limited class of cases. These include (1) the total deprivation of the right to counsel, *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); (2) a biased trial judge, *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); (3) unlawful exclusion of grand jurors of defendant's race, *Vasquez v. Hillery,* 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986); (4) denial of self-representation at trial, *McKaskle v. Wiggins,* 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); (5) denial of a public trial; *Waller v. Georgia,* 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); and (6) a defective reasonable doubt instruction, *Sullivan v. Louisiana,* 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). *See Ruiz,* 2006-1755, 955 So.2d at 85-86.

Other than in these six restricted classes of cases, the Supreme Court has failed to find structural error in the wide range of errors presented to it. When the Supreme Court speaks of a structural defect, it means that "the entire conduct of the trial from beginning to end is obviously affected by the [error]." *Fulminante,* 499 U.S. at 309-110, 111 S.Ct at 1265. The two examples used in *Fulminante* to illustrate this point were the total deprivation of the right to counsel, for which a defendant would be affected by the absence of counsel from the beginning to the end of the trial, or a biased trial judge, who would be presiding over the entire trial. From these examples, it is clear that when the Supreme Court speaks of structural error, the Court is referring to something which affects the entire framework of the trial and not something which may have differing degrees of impact, depending on other trial factors.

The court of appeal in this matter, however, concluded that:

> "the determination of whether an error or combination of errors is structural defies a strict formulaic evaluation. Rather, the determination will turn on a case by case analysis of the egregiousness of the complained of conduct, the constitutional ramifications of the error, and the degree of damage caused to the framework of the proceedings. It may be that a single error is of sufficient gravity to destroy the forum and thus constitute structural error. Likewise, an accumulation of less serious errors, when taken as a whole, may so undermine the framework of the proceedings as to rise to the level of a structural error." *Langley,* 2004-269 p. 12, 896 So.2d at 209-210.

Clearly, the court of appeal meant something very different from the Supreme Court's interpretation when it described "structural error." The court of appeal was looking to the **effect** of the error. In doing so, the court of appeal erred. An analysis of the "egregiousness of the conduct" or "degrees of damage" is, in reality, the type of harmless error review that a court would use to analyze a trial error. Conversely, a structural error, by its very nature, impacts the entire framework of the trial from beginning to end, without reference to any other trial consideration.

As explained in *Fulminante,* most errors which occur are trial errors, even though they may impact a defendant's constitutional rights. However, "constitutional error does not automatically require reversal of a conviction," and indeed, "most constitutional errors can be harmless," or reviewed for harmless error. *Id.,* 499 U.S. at 306, 111

S.Ct. at 1263. The court of appeal's opinion suggests that, in order to reverse the defendant's conviction and sentence, it had to find that a structural error occurred. That is not so, as a trial error which is not harmless beyond a reasonable doubt would likewise result in the reversal of the defendant's conviction and sentence.

The court of appeal found reversible error due to the judge's absence from portions of the trial. But a judge's absence from the bench for a few minutes would not necessarily, in the context of an entire trial, destroy the fundamental framework of the trial from beginning to end. Whether the conduct requires reversal of the conviction and sentence would depend upon what occurred during the judge's absence. Because there are degrees of prejudice that could result from this error to the criminal defendant, this is clearly a trial error, which simply injected an error in the trial process itself, and not a structural error or defect which affected the framework within which the trial proceeded. Trial error occurs during the presentation of the case to the trier of fact and may be quantitatively assessed in the context of the other evidence presented in order to determine whether [the error] was harmless beyond a reasonable doubt. *Fulminante*, 499 U.S. at 307-308, 111 S.Ct. at 1264; *Ruiz*, 2006-1755, 955 So.2d at 86.

It is unnecessary for us to make the further determination whether the trial error which occurred in *Langley II* was harmless beyond a reasonable doubt. Neither the state nor the defendant sought writs from the court of appeal's reversal of Langley's conviction of second degree murder; thus, the correctness of that ruling is not presently at issue. The court of appeal's reasoning with regard to the reversal of Langley's conviction is before us only

insofar as its determination that structural error occurred has implications to our present discussion.

Effect of Reversal Based on Trial Error

Langley contends that the jury verdict finding him guilty of second degree murder acted as an acquittal to the charged crime of first degree murder. Consequently, Langley argues that his re-indictment on first degree murder charges violates the prohibition against double jeopardy. The trial court agreed and quashed the indictment for first degree murder on Langley's motion.

The state contends, and the court of appeal held, that the trial in *Langley II* was void *ab initio*. Holding that a structural error is akin to an illegally constituted court under the provisions of La.C.Cr.P. art. 595,[5] the court of appeal reversed the trial court's ruling on the motion to quash, finding that Langley should not be considered as having previously been in jeopardy.

The Fifth Amendment of the U.S. Constitution provides that "no person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." As its principal protection, this prohibition against double jeopardy prohibits the State from prosecuting a defendant twice for the same crime in cases in which the defendant has been acquitted in the first trial. *Benton v. Maryland*, 395 U.S. 784, 796, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); *Green v. United States*, 355 U.S. 184, 188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957). In *Green*, the Supreme Court

[5] La.C.Cr.P. art. 595 provides, in pertinent part, "[a] person shall not be considered as having been in jeopardy in a trial in which: (1) The court was illegally constituted or lacked jurisdiction; . . . ".

held that when a defendant is convicted of a lesser included offense and that conviction is overturned on appeal, the conviction operates as an implied acquittal of the charged crime, prohibiting the State from retrying the defendant on the original charge. *Id.*, 355 U.S. at 193, 78 S.Ct. at 226-227 (the prohibition against double jeopardy prohibits a defendant from having to "barter his constitutional protection against a second prosecution" for the charged crime "as the price of a successful appeal from an erroneous conviction" on the lesser offense). The Louisiana Constitution contains a similar guarantee in Article 1, § 15.[6]

We have found that the reversible error which occurred in the retrial in *Langley II* was a trial error and not a structural defect. Consequently, where there was no structural error or jurisdictional defect,[7] there is no basis whatsoever for concluding that the trial in *Langley II* should be given no effect in a double jeopardy analysis. Although Langley's second degree murder conviction was reversed, the trial in which that conviction was obtained was not an absolute nullity.

All of the structural requirements were present in *Langley II* for its trial to be given effect for double jeopardy purposes. Once the state instituted prosecution by securing

---

[6] La. Const. art. 1, § 15 provides in pertinent part: " . . . No person shall be twice placed in jeopardy for the same offense, except on his application for a new trial, when a mistrial is declared, or when a motion in arrest of judgment is sustained."

[7] We do not subscribe to the appellate court's broad view that structural errors or defects *necessarily* constitute the functional equivalent of jurisdictional defects which render the proceedings not merely voidable but absolutely null.

a new grand jury indictment against Langley, the district court acquired subject matter jurisdiction over the felony proceedings pursuant to La. Const. art. V, § 16, and the court otherwise had personal jurisdiction over Langley. *See State v. Jackson,* 2004-2863, p. 11 (La.11/29/05), 916 So.2d 1015, 1021 ("Prosecution was properly commenced by valid bill of information that informed the accused of the nature of the charges against him and therefore jurisdiction was proper."). The trial court then convened the correct 12-person jury forum to try the case and properly instructed jurors with regard to unanimity required to return any lawful verdict. La. Const. art. 1, § 17(A); La.C.Cr.P. art. 782(A). The instructions admonished jurors that if they were not convinced beyond a reasonable doubt "that the defendant is guilty of First Degree Murder, but you are convinced beyond a reasonable doubt that the defendant is guilty of second degree murder the form of your verdict should be guilty of Second Degree Murder." Jurors then returned a lawful, unanimous verdict convicting Langley of second degree murder. Second degree murder is a crime under the laws of Louisiana and is a responsive verdict to a charge of first degree murder. LSA-R.S. 14:30.1; La.C.Cr P. art. 841(A). A unanimous verdict of a lesser included offense is a legal verdict in a capital prosecution. La. Const. art. 1, § 17(A); La.C.Cr.P. art. 782(A).

Under these circumstance, and by operation of long-standing double jeopardy law, we hold that the unanimous verdict of guilty of second degree murder returned by Langley's jury in *Langley II* implicitly acquitted him of first degree murder. The structure of the defendant's trial was not destroyed by the trial judge's error in absenting himself during portions of the trial. Even though the trial error requires a reversal of Langley's conviction and

sentence, the verdict rendered by the jury was a legal verdict and should be given effect pursuant to La.C.Cr.P. art. 598(A):

> When a person is found guilty of a lesser degree of the offense charged, the verdict or judgment of the court is an acquittal of all greater offenses charged in the indictment and the defendant cannot thereafter be tried for those offenses on a new trial.

Consequently, the state is limited in any subsequent prosecution to re-indicting the defendant on a charge of second degree murder.

CONCLUSION

Accordingly, we find that the court of appeal erred in this matter in reversing the trial court's ruling on the motion to quash. The trial judge's absence during portions of the trial in *Langley II* is not recognized as one of the extremely limited, restrictively-defined errors regarded as a structural defect by the Supreme Court. Because there were no structural errors or jurisdictional defects in the trial at issue in *Langley II*, but only trial error, the court of appeal's statements in *Langley II* and *Langley III* regarding the effect of an absolutely null verdict are *dicta*, inaccurate in the context of this case, and improper. The court of appeal's reliance upon this reasoning as "law of the case" was error. The trial court therefore remained free to apply the correct law of the case – that Langley's conviction for second degree murder acquitted him of the charged offense of first degree murder and that the state therefore may not retry him for that capital offense. The state, upon re-indictment of the defendant, is limited to charging the defendant with second degree murder. To the

extent that the majority opinion in *State v. Langley*, 2004-0269 (La.App. 3 Cir. 12/29/04), 896 So.2d 200, differs from the views expressed herein, it is expressly disapproved.

DECREE

Accordingly, the order of the court of appeal is reversed, the judgment of the district court limiting the prosecution of Ricky Joseph Langley to a charge of second degree murder in violation of LSA-R.S. 14:30.1 is reinstated, and this case is remanded for further proceedings consistent with the views expressed herein.

REVERSED, JUDGMENT OF TRIAL COURT REINSTATED AND REMANDED.

KNOLL, J., dissents and assigns reasons.

KNOLL, Justice, dissenting.

I disagree with the majority's resolution of this *res nova* double jeopardy issue. It defies logic that the absence of the trial judge from critical stages of the prosecution results in the rendition of no legal verdict, either of conviction or of acquittal, and yet the defendant can use the jury's verdict of second-degree murder to bootstrap a plea of double jeopardy, and thus deny the State the opportunity to retry him for first-degree murder, the originally charged offense. No one is entitled to an illegally constituted trial that renders the conviction and sentence a nullity; nor is anyone entitled to claim the benefits from a trial that is considered not to be a trial, i.e., a nullity. My review of the law and jurisprudence convinces me defendant's plea of double jeopardy is without merit.

La.Crim.Code Ann. art. 595 specifically provides that "[a] person shall not be considered as having been in jeopardy in a trial in which . . . [t]he court was illegally constituted or lacked jurisdiction; . . . ." The phrase "was illegally constituted" encompasses a number of defects or irregularities not waived by defendant's failure to object. La.Crim.Code Ann. art. 595, Comment (c). In that light, this Court stated in *State v. Kent,* 262 La. 695, 264 So.2d 611, 614 (1972), "Article 595 is meant to be illustrative of non-jeopardy proceedings in trials, setting out examples of frequent bases for dismissal of a prior proceeding where the defendant has not been placed in 'danger.'" The basis for the requirement that, in order to support a plea of former jeopardy, the previous proceeding must be validly based is that the previous conviction might be upset at any time. *See State v. Williams,* 301 So.2d 587, 588 (La.1974).

In the present case, I find the trial judge's absence during voir dire and closing arguments the equivalent of a "court [that] was illegally constituted." When the judge is absent at a critical stage, the forum is destroyed. *Gomez v. United States,* 490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989); *United States v. Mortimer,* 161 F.3d 240 (3 Cir.1998). As the court held in *Mortimer,* when the trial judge absents himself/herself during the trial, "[t]here is no trial." Moreover, "[t]he verdict is a nullity." *Id.* at 241, citing *Gomez,* 490 U.S. at 876, 109 S.Ct. 2237. In my view, the verdict was a nullity in the case *sub judice*; thus, I find it clear under the provisions of La.Crim.Code Ann. art. 595 that the defendant's interjection of a plea of double jeopardy is neither supported nor sustainable. Obviously, the defendant was not placed in jeopardy on his second trial because of the nullity of the verdict that the trial judge's absence precipitated.

I further find no infringement of defendant's constitutional right to appeal if the State is allowed to retry him for first-degree murder. "[T]he chilling [effect on] appeals does not in and of itself offend due process." *United States v. Henry,* 709 F.2d 298, 316 n. 26 (5 Cir.1983). As this Court stated in *State v. Williams,* 00-1725 (La.11/28/01), 800 So.2d 790, "[D]ue process is not offended by all possibilities of increased punishment after appeal, only those which involve 'actual retaliatory motivation' or 'pose a realistic likelihood of vindictiveness.'" *Williams,* 800 So.2d at 798-799, quoting *Blackledge v. Perry,* 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). The defendant exercised his appellate right, called the court's attention to the egregious nature of the trial court's conduct in his second trial, and obtained the relief he sought – the reversal of the jury verdict. In the present case, the State now seeks nothing that it did not already pursue.

For these reasons, I respectfully dissent.

896 So.2d 200

Court of Appeal of Louisiana,
Third Circuit.
STATE of Louisiana
v.
Ricky J. LANGLEY.
No. 04-269.

Dec. 29, 2004.

Rick Bryant, District Attorney, Cynthia S. Killingsworth, Assistant District Attorney, Sharon Darville Wilson, Assistant District Attorney, Lake Charles, Counsel for Appellee: State of Louisiana.

Carla S. Sigler, Assistant District Attorney, Lake Charles, Counsel for Appellee: State of Louisiana.

Clive Stafford Smith, Christine Lehmann, New Orleans, Counsel for Defendant/Appellant: Ricky J. Langley.

Ricky J. Langley, Louisiana State Penitentiary, Angola.

Court composed of ULYSSES GENE THIBODEAUX, Chief Judge, and BILLIE COLOMBARO WOODARD and OSWALD A. DECUIR, Judges.

DECUIR, J.

The Defendant, Ricky Langley, was indicted for the first degree murder of six-year-old Jeremy Guillory. He pled not guilty and not guilty by reason of insanity. After a jury trial, the Defendant was convicted of second degree murder and sentenced to life imprisonment. He now seeks review of his conviction, raising fifteen assignments of error. Because we find error in the conduct of the trial, we reverse and remand for a new trial.

I. FACTS

The testimony in the record and the Defendant's detailed confession illustrate the following facts: On February 7, 1992, the Defendant was a boarder of the Lawrence family. The Lawrence home was located in a rural neighborhood in Calcasieu Parish. The victim, a neighbor, came to the Lawrence home to play, but the two Lawrence children were not home. The Defendant then invited the victim inside to wait for their return. While the victim was playing in the children's bedroom, the Defendant came into the room, grabbed him around the neck, and strangled him. Later, he hid the boy's body in a closet and covered him with blankets. There was also evidence that the Defendant, an admitted pedophile, sexually molested the boy either before or after his death.

When the victim's mother came to the house looking for her son, the Defendant helped her search for him in the surrounding area. He also placed a 911 call to report the missing child. Three days later, the local police learned the Defendant was a convicted child molester and a Georgia parole violator. An officer and two FBI agents located the Defendant at his place of employment where he was read his *Miranda* rights and arrested on the parole violation. After reading the Defendant his rights a second time, one of the agents informed the Defendant that he was a suspect in the disappearance of the victim. The Defendant then admitted killing the victim and told the officers the body was in his bedroom closet. Upon arriving at the Lawrence home, the Defendant gave the officers a tour of the house and walked them through the events surrounding the murder, all of which was videotaped with his consent. He subsequently gave a second videotaped confession.

II. PROCEDURAL HISTORY

The Defendant was originally convicted of first degree murder under La.R.S. 14:30 and sentenced to death. The Louisiana Supreme Court affirmed his conviction and sentence, but on application for rehearing, remanded the case to the district court for an evidentiary hearing on the Defendant's claim regarding intentional discrimination in the selection of the grand jury foreperson. *State v. Langley,* 95-1489 (La.4/14/98), 711 So.2d 651, *reh'g granted in part* (La.6/19/98). On remand, the district court granted the Defendant's motion to quash, finding the Defendant established a *prima facie* case of intentional discrimination which was not rebutted by the State. The supreme court affirmed the ruling and ordered further proceedings. *State v. Langley,* 95-1489 (La.4/3/02), 813 So.2d 356.

The Defendant was subsequently reindicted on a charge of first degree murder, to which he pled not guilty and not guilty by reason of insanity. Because of great pretrial publicity, jury selection was moved to Orleans Parish, but the case was tried in Calcasieu Parish, where the sequestered jury was housed for the duration of the proceedings. The jury rejected the Defendant's insanity defense and convicted him of the lesser included offense of second degree murder, a violation of La.R.S. 14:30.1; he was then given the mandatory sentence of life imprisonment. It is from this conviction and sentence that the Defendant now appeals.

The Defendant's primary assignments of error in this appeal are that the trial judge erred in absenting himself during jury voir dire and closing arguments, in cutting off closing arguments, and in prohibiting contemporaneous objections. He contends these errors compromised the very

structure of the trial and require reversal without a showing of prejudice. Other assignments of error relate to evidentiary rulings, jury instructions, and alleged *Batson* violations in the jury selection process. The Defendant also complains of the trial court's improper references to the possibility of release after a not guilty by reason of insanity verdict and the State's failure to prove sanity as an element of the offense charged.

Regarding the Defendant's complaints concerning the trial judge's absences from the bench, the record does not reflect every absence, but the State has agreed with the Defendant's characterization of the judge's conduct. As this conduct necessarily has constitutional ramifications, we will address the Defendant's assignments of error in the context of both what the trial judge missed and the necessary adjustments made in the course of the proceedings to accommodate the judge's absence. The question to be resolved is whether the trial judge's conduct constitutes trial error, which is subject to review for harmless error, or structural error, which defies analysis by harmless error standards. *Arizona v. Fulminante,* 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991).

III. ABSENCE OF THE TRIAL JUDGE

A. Voir dire

The Defendant contends the judge's absence during significant portions of voir dire was a structural error which requires reversal. He questions whether the trial court's actions constitute an abdication of his judicial responsibilities so as to deprive the parties of a fair trial. It is urged that in failing to observe potential jurors, the court was unable to respond meaningfully to challenges

and objections and otherwise insure the empaneling of a fair and impartial jury. The judge's rulings on various State challenges as well as a general *Batson* challenge are questioned by the defense given the fact that the judge was not present during questioning of numerous potential jurors.

The transcript of voir dire does not indicate when the judge entered or exited the courtroom, as the judge's minute clerk and court reporters did not record his entries and exits. However, comments by the judge indicate his intent to leave the courtroom, and both parties acknowledge that he did so at various points during voir dire:

> I'm going to spend about 10 or 15 minutes with the Court Administrator while y'all doing this stuff. You don't – you don't need me. If you need me, just stop doing what you're doing and I'll be right back. But I'm not gonna address the jury, that's a waste of time. You guys just do what you gotta do.
>
> . . . .
>
> I've got to see the Court Administrator about transportation and a bunch of other stuff. So, they're going to start asking you questions. I don't want any objections while I'm gone, please. When I come back y'all can make your objections. Any questions before I leave?
>
> . . . .
>
> Okay. Good luck. All right. You may start.
>
> . . . .
>
> Now, also, again, I have many things to do this morning to prepare for this. I'll be in and out of

> here. If there's an objection or something, you will stop talking to that juror until I come back.
>
> . . . .
>
> Now, I'm gonna be in and out of here because I've got many things to do. I mean, my job is a hundred-fold.
>
> . . . .
>
> Don't think I'm not interested, I've just got things to do as far as accommodations, making sure everything's going right, making sure I can leave here tomorrow, make sure the jury can leave here tomorrow, making sure the defendant is transported by the sheriff's department back to Calcasieu Parish, the whole bit. There are many things I've got to do, money, hotel bills I've got to pay for, everything. So, I've got – and I gotta do this all today.

Our review of the record reveals several instances where the trial judge was absent during the questioning of a potential juror and that juror became the subject of a challenge for cause. The record makes clear the trial judge did not hear interrogation responses of at least five challenges for cause. Additionally, the record indicates the judge was absent for the questioning of a panel from which four jurors were peremptorily challenged by the State; the Defendant's subsequent *Batson* objection to those challenges, it is urged, could not be effectively addressed by the court due to the judge's absence.

The Defendant contends the trial judge's absences constitute reversible error. The State suggests the judge's absences were without objection by the Defendant and constitute merely harmless error. The State argues the

judge did not intend to give up control of the proceedings inasmuch as he informed counsel that if an objection arose, they were to await his return. However, the Defendant argues the judge's failure to hear the jurors' responses certainly affected his ability to exercise discretion in ruling on challenges.

B. Closing arguments

In setting forth the procedure for closing arguments, the trial court established a two-hour time limit for each side. Counsel for the defense chose to divide both their time and the subject matter of their arguments, allocating forty-five minutes to Ms. Mann to discuss specific intent and seventy-five minutes to Mr. Smith to discuss the insanity defense. The State likewise divided its time between Ms. Wilson and Ms. Killingsworth. The trial judge prohibited objections during closing arguments, then vacated the bench during those arguments. He informed the parties that he would be in chambers if anything got "crazy":

> I will be in and out of here. I'm going to take my dress off. Okay. Because there are no objections, there's no reason for me to – I'll stick my head in and see what's happening. Anything get crazy, just – I'll be in Chambers. Okay. Just let me know and I'll bring my gun and shoot somebody.

The transcript indicates the judge walked out just before the prosecutor began her closing argument. In fact, when Ms. Wilson addressed the Court with the typical, "May it please the Court," the judge was already gone and the court reporter noted laughter in the courtroom. The judge returned at the conclusion of Ms. Wilson's argument.

He informed the jury the defense was then going to give its closing argument in two parts and he stated he would stay for "May it please the Court," and again leave the courtroom. When Ms. Mann finished her portion of the argument, the bailiff announced there would be a ten minute break. After the recess, the judge returned and stated the proceedings would continue with the Defendant's next argument, and he noted it was 11:34 a.m. at that point. He then exited the courtroom, and Mr. Smith began his portion of the defense's closing argument. At some point during Mr. Smith's argument, the judge stepped back into the courtroom and announced that counsel had two minutes remaining. Mr. Smith disagreed, to no avail. At his urging, the judge ultimately allowed Mr. Smith five minutes. Defense counsel states in brief that the bailiff, who was apparently keeping time for the closing arguments, informed the judge that he cut Mr. Smith's argument short, but the judge "refused to heed this advice." The State does not contest defense counsel's assertion that his argument was shortened.

As Ms. Killingsworth, the lead prosecutor, was beginning her rebuttal argument, the judge again exited the courtroom and, during the argument, Mr. Smith interrupted her. Defense counsel states in brief that the Defendant suffered a "significant schizophrenic episode." Counsel characterizes the Defendant's behavior as a "psychotic break," during which he became increasingly agitated and disturbed. The Defendant began to rock himself and talk aloud. Ms. Killingsworth continued her argument while the judge was summoned. When he appeared several minutes later, the judge had the jury removed and determined that the Defendant should be

taken out of the courtroom. Upon the jury's return, the judge gave the following explanation:

> My sincere apologizes [sic] for me interrupting this way, my apologies to you. Mr. Langley is no longer in court. The same instructions applies [sic] to you, please do not think that this is some tactic or something. It's simply so I can get this over with, you can get this over with. Okay? We're not going to get this over with at the State's expense or their expense. We've been fair, and we're going to be fair. Okay? I don't care how long it takes, we're going to be fair. Okay?

The prosecutor then completed her closing argument.

After closing arguments, several issues were taken up outside the presence of the jury, including the defense's objection to the judge's absence:

> I went up – I want the record to reflect I went up to Ms. Killingsworth – and you know, I hated to interrupt her, but I had to forewarn her of what was going on.
>
> She whispered to me that we needed the Judge. It took us four or five minutes to get the Court down here. And, you know, I'm just really concerned that this jury thinks that that's some sort of manipulative bullshit.
>
> THE COURT:
>
> I've already instructed the jury.
>
> MR. SMITH:
>
> I understand, Judge, but I'm just raising an objection to the fact that the Court wasn't present.

In this appeal, the Defendant contends the trial judge's absence from the courtroom during closing arguments was highly prejudicial in three respects and requires reversal of the conviction. He contends the trial judge's absence required that contemporaneous objections be prohibited, resulted in inaccurate timing of the arguments whereupon his lead counsel's argument was cut short by thirteen minutes, and set the stage for the prolonged episode of distress displayed by the Defendant during the State's rebuttal argument.

1. Contemporaneous objections

The Defendant contends the trial court prohibited contemporaneous objections during closing arguments so that he could exit the courtroom during the arguments. He cites *State v. Potter,* 591 So.2d 1166, 1169 (La.1991), which describes the fundamental purposes of the contemporaneous objection rule as, first, to place the trial judge on notice that a problem exists and, second, to give the court a chance to correct the alleged error before it infects the entire proceeding. He also relies on *State v. Prestridge,* 399 So.2d 564 (La.1981), for the proposition that a defendant has a right to make contemporaneous objections during closing arguments. The Defendant gives four instances during the State's closing argument where he would have objected and argues the prohibition was a structural error mandating reversal without a showing of prejudice.

The State contends the Defendant's failure to contemporaneously object to the prohibition prevents him from raising the issue on appeal. The record does reflect, however, that defense counsel had little opportunity, if any, to object before the judge left the courtroom. When the

arguments were concluded, defense counsel lodged a general objection to the judge's absence and listed specific objections to the content of the prosecutor's argument.

2. Inaccurate timing

Defense counsel states he was allowed to argue for only sixty-two of his seventy-five minutes and thus was cut off thirteen minutes early. He proffered notes which outlined that portion of the argument he was forced to abandon. While recognizing that a trial court generally has authority to curtail arguments, the Defendant argues that is done only when there is a reasonable basis such as repetitiveness, inappropriateness, or wandering beyond the scope of the argument, but here, there was no reasonable basis for cutting off counsel's argument. He contends his counsel prepared and coordinated their arguments based upon the assurance that they had two hours to present their argument to the jury. The topics argued by one attorney were not to be addressed by the other. The Defendant's plea in this case was not guilty and not guilty by reason of insanity, and what Mr. Smith intended to cover was pertinent to the issue of whether the Defendant was insane at the time of the commission of the offense. The trial judge was not present during the majority of the closing arguments, and, thus, the Defendant urges us to find the act of shortening counsel's time could not have been based on a concern that allowing counsel the full duration of the argument would result in repetitiveness.

The Defendant relies on *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975), a case which set forth both the importance of a defendant's right to a closing summation and the necessary discretion of the

trial judge in controlling closing arguments. He then cites *State v. Washington*, 614 So.2d 711 (La.1993), where a defendant's conviction was reversed based on defense counsel's insufficient time to fully and completely present a closing argument to the jury.

The State contends defense counsel was given a generous amount of time to present argument and this time was "more than ample to portray and summarize the defense theory of the case to the jury." Additionally, the State contends the defense cannot establish that anything it had intended to say during those thirteen minutes would have impacted the jury or altered the verdict. While conceding the better course of action would have been for the judge to allow the defense its entire allotted time, the State argues the judge has discretion in controlling, limiting and terminating closing arguments, and his actions should not be considered reversible error.

3. Psychotic episode

Defense counsel contends the trial judge's absence during closing arguments magnified and prolonged the problems caused by the Defendant's psychotic episode. He argues that both the Defendant's actions and the need for counsel to interrupt the prosecutor were highly prejudicial, perhaps leading the jury to find the episode was staged or manipulated and designed either to gain sympathy for the Defendant or to disrupt the prosecutor. Defense counsel contends the entire episode could have been dealt with promptly and spontaneously had the judge been present on the bench when it began.

The State argues the Defendant must once again show prejudice for this alleged error to be reversible. Further,

the State contends that, rather than prejudice, the episode probably served to bolster the Defendant's insanity defense and could not have been prevented or controlled by the trial judge's presence.

IV. FAILURE TO MAINTAIN ORDER AND DECORUM

The trial judge has primary responsibility for maintaining order and decorum in the courtroom and must control criminal proceedings so as to insure that justice is done. *See* Code Crim. P. art. 17. We recognize that the trial judge's intent in the instant case may have been to create a casual atmosphere to put jurors at ease and make them feel welcome; however, the trial judge not only failed to maintain order and decorum but also actively contributed to creating an aura of jocularity inappropriate to the gravity of the proceedings.

Combined with the trial judge's casual comings and goings from the courtroom were his ongoing jokes, lighthearted comments, and irreverent attitude towards the proceedings at hand. During voir dire, he kept up a running joke about the New Orleans venire members not looking forward to a two-week stay in "beautiful Lake Charles," where quite a bit of the court's money would be spent on housing them nicely and feeding them well. He made a point to tell prospective jurors that he did not want to be in court on this case any more than they did. In addition to divulging a myriad of details about his personal life, the trial judge told lawyer jokes implying dishonesty, used potentially offensive slang and referred to witnesses and jurors casually and colloquially. To one group of prospective jurors, he explained the position of

the Catholic Church and the Pope on the death penalty; to another he noted his disagreement with the theory that pedophiles "just can't help it" when they molest children. Throughout the proceedings, and especially during voir dire, the trial judge peppered the record with facetious comments and remarks that served to undermine the gravity of this most serious first degree murder trial.

V. LEGAL PRECEDENT

We find the trial judge's absences from jury voir dire and closing arguments, coupled with his jocular attitude towards the proceedings, constitute legal error. We must necessarily determine whether this error is a "trial error" or a "structural error," as the consequences of the two types differ substantially. In *State v. Jones,* 98-1165, p. 5 (La.App. 3 Cir. 2/3/99), 734 So.2d 670, 673, this court, citing *Fulminante,* 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302, defined the terms as follows:

> A "trial error" is one which occurs during the presentation of the case to the jury and can be quantitatively assessed in the context of other evidence presented to prove guilt. A "structural error" affects the framework within which the trial proceeds, rather than an error in the trial process. It defies harmless error standards and cannot be quantitatively measured.

See also, State v. Hampton, 00-0522 (La.3/22/02), 818 So.2d 720; *State v. Brown,* 03-1747 (La.App. 3 Cir. 5/12/04), 874 So.2d 318.

The Defendant relies on *Gomez v. U.S.,* 490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989), in urging this court to find structural error in the judge's absence during

voir dire. In *Gomez,* the court was called upon to determine whether the authority to preside over voir dire was within the duties a magistrate may be assigned under the Federal Magistrates Act. In determining this was not a duty which may be assigned, the court explained:

> In any event, we harbor serious doubts that a district judge could review this function meaningfully. Far from an administrative impanelment process, *voir dire* represents jurors' first introduction to the substantive factual and legal issues in a case. To detect prejudices, the examiner – often, in the federal system, the court – must elicit from prospective jurors candid answers about intimate details of their lives. The court further must scrutinize not only spoken words but also gestures and attitudes of all participants to ensure the jury's impartiality. See, *e.g., Wainwright v. Witt,* 469 U.S. 412, 428, *n.* 9, [105 S.Ct. 844, 854, n. 9, 83 L.Ed.2d 841] (1985) (quoting *Reynolds v. United States,* 98 U.S. 145, 156-157, 25 L.Ed. 244 (1879)). But only words can be preserved for review; no transcript can recapture the atmosphere of the *voir dire,* which may persist throughout the trial. Cf. *Waller v. Georgia,* 467 U.S. 39, 49, n. 9, [104 S.Ct. 2210, 2217, n. 9, 81 L.Ed.2d 31] (1984) ("While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real"). The absence of a specific reference to jury selection in the statute, or indeed, in the legislative history, persuades us that Congress did not intend the additional duties clause to embrace this function.

Id. at 874-76, 109 S.Ct. at 2247-48 (footnotes omitted).

The *Gomez* court found "harmless-error analysis does not apply in a felony case in which, despite the defendant's objection and without any meaningful review by a district judge, an officer exceeds his jurisdiction by selecting a jury." *Id.* at 876, 109 S.Ct. at 2248.

In the instant case, the trial judge did not merely relinquish the right to review another court officer's conduct of voir dire; rather, he abandoned his responsibility to oversee voir dire and, therefore, compromised his own ability to exercise discretion in ruling on challenges. This type of error impinges on the foundation of the trial, *i.e.*, jury selection, and affects the framework on which the entire proceedings are built.

Turning to the arguments asserted by the defense on the closing summation problems, we again look to federal jurisprudence for guidance on these issues. In *U.S. v. Mortimer,* 161 F.3d 240 (3rd Cir.1998), the judge absented himself without notice sometime after the state's closing argument. Shortly after defense counsel began her argument, the prosecutor noticed the judge was absent. The judge returned to the courtroom in time to thank defense counsel and to call for rebuttal argument. In finding structural error occurred, the *Mortimer* court stated:

> A trial consists of a contest between litigants before a judge. When the judge is absent at a "critical stage" the forum is destroyed. *Gomez v. United States,* 490 U.S. 858, 873, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989). There is no trial. The structure has been removed. There is no way of repairing it. The framework "within which the trial proceeds" has been eliminated. *See Arizona v. Fulminante,* 499 U.S. 279, 309-10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The verdict is a

nullity. *Gomez,* 490 U.S. *at* 876, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989).

We cannot, of course, anticipate every circumstance under which the judge's absence may destroy the structure. The structure normally stands if the parties consent to excuse the presence of a judge. *Id.* at 870, 109 S.Ct. 2237; *United States v. Love,* 134 F.3d 595, 605 (4th Cir.), *cert. denied,* [524] U.S. [932], 118 S.Ct. 2332, 141 L.Ed.2d 705 (1998); *Stirone v. United States,* 341 F.2d 253, 256 (3d Cir.), *cert. denied,* 381 U.S. 902, 85 S.Ct. 1446, 14 L.Ed.2d 284 (1965). No consent occurred here. Before whom was defense counsel to offer consent? That defense counsel continued her summation cannot be construed as consent. Was she to stop in midsentence as it were and wait for such time as the judge should reappear? She did her best under the circumstances but her carrying on in adversity cannot be turned into agreement to the judge's absence.

The government contends that the defense must show prejudice. The government relies on *Love* and *Stirone* where consent made the difference and on two cases, *Haith v. United States,* 342 F.2d 158, 159 (3d Cir.1965) and *United States v. Boswell,* 565 F.2d 1338, 1341-42 (5th Cir.), *cert. denied,* 439 U.S. 819, 99 S.Ct. 81, 58 L.Ed.2d 110 (1978), which have been made obsolete by *Gomez, supra.* An additional case, *United States v. Pfingst,* 477 F.2d 177, 195-96 (2d Cir.), *cert. denied,* 412 U.S. 941, 93 S.Ct. 2779, 37 L.Ed.2d 400 (1973), invoked by the government, does not bear on what happened here; it involved a judge's announced absence from the state for a short time during jury deliberations. *Id.* at 196. A single case, *Heflin v. United States,* 125 F.2d 700, 700 (5th Cir.), *cert. denied,* 316 U.S. 687, 62 S.Ct.

> 1276, 86 L.Ed. 1759 (1942), is cited by the government where the judge was unexpectedly absent when the jury and counsel were in the courtroom. The absence was two or three minutes and explained as a trip to an adjacent lavatory. This precedent is not close enough to be persuasive and it belongs to an era when structural error was not the criterion. Prejudice to the defendant from the jury inferring that the defense was not worth listening to may have occurred; it is not necessary on this appeal for the defendant to demonstrate it. The structural defect determines the result.

***Id.* at 241-42.**

In *Riley v. Deeds,* 56 F.3d 1117 (9th Cir.1995), during jury deliberations, the jury requested that the victim's testimony be read back to them. The trial judge could not be located, so in his absence, court was convened by his law clerk. The law clerk informed the jury that the victim's testimony would be read to them and that the foreman should indicate when the jury had heard enough. The foreman of the jury did so after the victim's direct testimony was read. Concluding this constituted error, the court reasoned:

> A judge's absence during a criminal trial, including court proceedings after a jury begins deliberations, is error of constitutional magnitude. *See Peri v. State,* 426 So.2d 1021, 1023-24 (Fla.Dist.Ct.App.1983) (listing state court cases recognizing this principle). The presence of a judge is at the "very core" of the constitutional guarantee of trial by an impartial jury. *Id.* at 1023. "This proposition has been so generously admitted, and so seldom contested, that there has been little occasion for its distinct assertion."

Id. (quoting *Capital Traction Co. v. Hof,* 174 U.S. 1, 13-14, 19 S.Ct. 580, 585-86, 43 L.Ed. 873 (1898)).

Id. at 1119.

It is evident from the jurisprudence that the determination of whether an error or combination of errors is structural defies a strict formulaic evaluation. Rather, the determination will turn on a case by case analysis of the egregiousness of the complained of conduct, the constitutional ramifications of the error, and the degree of damage caused to the framework of the proceedings. It may be that a single error is of sufficient gravity to destroy the forum and thus constitute structural error. Likewise, an accumulation of less serious errors, when taken as a whole, may so undermine the framework of the proceedings as to rise to the level of a structural error.

Our review of the record and the aforementioned jurisprudence compels us to find the errors committed by the trial judge, in absenting himself from these proceedings and failing to maintain decorum, were structural errors requiring reversal of the Defendant's conviction without a showing of actual prejudice. We base this decision not merely on the judge's actions in leaving the courtroom, but also on the consequences of those actions, *i.e.*, the inability to adequately and appropriately oversee voir dire and rule on challenges, the necessity of prohibiting contemporaneous objections during closing arguments, the miscalculation – or even the appearance of miscalculating – the allotted time for closing arguments, and the unavailability of an authoritative figure in the courtroom to immediately squelch disruptions. Those consequences, combined with an air of frivolity, destroyed the framework of the trial itself and require reversal. "Equally basic is a

defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside." *Gomez,* 490 U.S. at 876, 109 S.Ct. at 2248.

VI. EFFECT OF ABSOLUTELY NULL VERDICT

The State requests, if this court finds the errors concerning the trial judge's absences are structural, that this court declare the Defendant's trial a nullity and allow the State to proceed to a new trial under the original first degree murder charge. The State's requests are part of the record, and justice would not be served in failing to address the issue. In support of its position, the State cites language from *Mortimer,* 161 F.3d at 241 which states that the forum is destroyed when the judge is absent and there is no trial. The *Mortimer* court reversed the district court judgment and remanded the case for a new trial.

Article 595 of the Louisiana Code of Criminal Procedure provides in part that a "person shall not be considered as having been in jeopardy in a trial in which: (1) The court was illegally constituted. . . ." The 1966 Official Revision Comment to Article 595 offers the following explanation of the statutory language:

> [I]f the proceedings were absolutely null because the court lacked jurisdiction, or because the indictment had absolutely no legal effect, or because of some error or defect not cured by defendant's failure to object, the first trial, whatever its result, cannot be used by the defendant on the second trial to support a plea of double jeopardy, because he was not in danger on the first trial, either in law or fact.

La.Code Crim.P. art. 595, cmt.(a)(1).

Generally, in Louisiana, if there are curable defects or errors in a defendant's first trial, he will either object and obtain relief or his failure to object will operate to cure the defects or errors. However, if the error or defect is not curable, as in the instant case, the defendant has necessarily not been in jeopardy because of the presence of the error or defect. *See* La.Code Crim.P.art. 595, cmt.(b).

Our supreme court discoursed on this issue in *State v. Goodley,* 423 So.2d 648 (La.1982), wherein it was determined that an illegally obtained manslaughter verdict did not bar retrial for first degree murder based on double jeopardy. Subsequently in *State v. Campbell,* 95-1409 (La.3/22/96), 670 So.2d 1212, the court held the defendants could be retried for jury tampering after a jury returned an invalid verdict of guilty of attempted jury tampering. Cases such as these which involve an invalid jury verdict or structural error affecting the framework of the trial itself fall outside the general rule articulated in La.Code Crim.P. art. 598. Article 598 provides that when a defendant is found guilty of a lesser degree of the offense charged, the verdict acts as an acquittal of all greater offenses charged in the indictment. However, when a structural error destroys the validity of the proceedings, the trial and resulting verdict are an absolute nullity and can have no effect whatsoever.

The United States Supreme Court addressed the issue in *Sattazahn v. Pennsylvania,* 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003), a case where the defendant was convicted of first degree murder, but the jury deadlocked in the penalty phase. The jury was unable to agree on whether an aggravating circumstance warranted the death penalty; the trial judge, following state law, then entered a life sentence. The Supreme Court held there was

no double jeopardy bar to the state's seeking the death penalty on retrial after the defendant's successful appeal.

In *Goodley,* the court addressed double jeopardy issues which arise when an illegal verdict is found. The court succinctly explained:

> Where no valid judgment has been obtained, the defendant's double jeopardy interests simply cannot be considered to extend so far as to compel society to relinquish its interest in punishing one whose guilt is clear by means of a fair and procedurally accurate trial.
>
> This principle has been implicitly recognized and followed in Louisiana. In the case of *State v. Cook,* 396 So.2d 1258 (La.1981) a patent error review revealed an invalid verdict which necessitated the reversal of the defendant's conviction. In ordering the reversal, this court held that retrial of the defendant was proper because "there was no legal verdict rendered, either of conviction or of acquittal". *Cook,* supra at 1261. Although the *Cook* opinion does not directly address the double jeopardy issue, its holding does implicitly recognize that the double jeopardy protection simply does not extend to a situation in which no verdict, either of conviction or acquittal, has been rendered.
>
> It therefore becomes evident that the prohibition against double jeopardy does not operate to bar Goodley's retrial for the crimes of first degree murder or manslaughter. Although there is no doubt that jeopardy did attach in Goodley's initial trial for first degree murder, such jeopardy is not regarded as having come to an end so as to bar a subsequent prosecution for either first degree murder or manslaughter. Under the Fifth

> Amendment, where a non-waivable defect, such as an illegal verdict, prevents a jury from delivering either a conviction or acquittal at a defendant's first trial, that defendant cannot avail himself of the plea of double jeopardy.

Goodley, 423 So.2d at 651.

The *Goodley* and ***Mortimer*** cases characterize the verdict resulting from structural error as a nullity. The concept of nullity in criminal proceedings has long been distinguished from mere error, the latter of which may or may not affect the validity of the verdict. In describing the finality of a criminal verdict at a time when convictions were not appealable, Chief Justice Marshall, in 1830, explained that a judgment could not be unlawful, "unless that judgment be an absolute nullity." *See* Berkowitz, "Error – Centricity, Habeas Corpus and the Rule of Law as the Law of Rulings," 64 La.L.Rev. 477, 486 (2004), *citing Ex Parte Watkins,* 28 U.S. (3 Pet.) 193, 202-03, 7 L.Ed. 650 (1830).

The necessary consequence of such a verdict is retrial, as though no verdict had been reached. *State v. Self,* 00-633 (La.App. 3 Cir. 11/2/00), 772 So.2d 337. In *State v. Norman,* 34,868 (La.App. 2 Cir. 10/31/01), 799 So.2d 619, the court noted that principles of double jeopardy do not preclude retrial of a defendant whose conviction is set aside because of judicial error. Similarly, in *State v. Williams,* 00-1725, p. 9 (La.11/28/01), 800 So.2d 790, 798, the supreme court explained:

> It is well settled that "the chilling [effect on] appeals does not in and of itself offend due process." *United States v. Henry,* 709 F.2d 298, 316 n. 26 (5th Cir.1983). More specifically, due process is not offended by all possibilities of increased

> punishment after appeal, only by those which involve "actual retaliatory motivation" or "pose a realistic likelihood of 'vindictiveness'." *Blackledge v. Perry,* 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); *Henry,* 709 F.2d at 315-16.

Our opinion should not be construed as an instruction to the district attorney on how to charge the defendant upon remand. Clearly, under Article 61 of the Code of Criminal Procedure, we have no authority to tell the district attorney how to handle any prosecution of this matter in the future. Rather, we have described the effects of an absolutely null judgment of conviction: It is as though the conviction never occurred. Consequently, it is within the discretion of the district attorney to exercise any of the prosecutorial options available to the State of Louisiana upon remand.

DECREE

In view of the foregoing, we reverse the Defendant's conviction and sentence and remand for retrial consistent with the views expressed herein.

REVERSED AND REMANDED.

THIBODEAUX, C.J., concurs in part and dissents in part and assigns reasons. THIBODEAUX, C.J., concurring in part and dissenting in part.

I agree with Parts I, II, III, and V of the majority opinion. I disagree that Parts IV and VI are necessary in deciding this case for the following reasons.

Structural error deals with legal transgressions. The majority addresses what appears to be ethical mishaps in Part IV. Even if these implied ethical transgressions had

not occurred, the structural errors would still exist and would require reversal.

Part VI entitled "Effect of Absolutely Null Verdict" is advisory. We must remember that it is the defendant who appealed. None of the fifteen assignments of error asserted by the defendant deal with the effect of an absolutely null verdict. The consequences of a reversal was addressed at oral argument only when, somewhat presciently, the State determined that its position was quite tenuous. The Louisiana Constitution implicitly prohibits us from issuing advisory opinions. Absent a justiciable issue that is brought by adverse parties with opposing claims, judicial determination of any action by a court is improper. *Perschall v. State,* 96-0322 (La.7/1/97), 697 So.2d 240. The issues of double jeopardy and the character of the charge upon remand are simply not before us. We typically address only those issues or specifications of error that were presented to the trial court and which are properly before us.

Moreover, the majority's opinion clearly states that: "[t]he question to be resolved is whether the trial judge's conduct constitutes trial error, which is subject to review for harmless error, or structural error, which defines analysis by harmless error standards." That is exactly what we are asked to decide. Nothing more and nothing less.

However, to the extent that the majority feels it is necessary to respond to the State's request at oral argument to proceed upon remand with a first degree murder charge, I am compelled to respond.

State v. Goodley, 423 So.2d 648 (La.1982) supports the *defendant's,* not the State's, position. The defendant was

charged with first degree murder but convicted of manslaughter. The defendant appealed on the basis of excessiveness. His conviction was reversed on the basis of a patent error. The State sought to retry him on first degree murder. He filed a motion to quash. The Louisiana Supreme Court agreed that *double jeopardy* would not bar retrial of the defendant on a first degree murder charge, as stated in the majority opinion. However, the *Goodley* court said that, while double jeopardy did not bar retrial, there were *other* constitutional protections which did. The Louisiana Supreme Court specifically held that . . . "we are of the opinion that *to retry Goodley for the crime of first degree murder would be inconsistent with the right to appeal in Louisiana*." *Id.* at 650. It forbade the trial court from retrying the defendant on a first degree murder charge based on Article 1, § 19 of the Louisiana Constitution which guarantees that a defendant in felony cases has a right to appeal. Similarly, to retry Langley on first degree murder would be inconsistent with the right to appeal based on Article 1, § 19 of the Louisiana Constitution. That is exactly what *Goodley* held. In *Goodley*, the supreme court held that the State's actions in attempting to retry Goodley on a first degree murder charge would be unconscionable. Similarly, to retry Langley in this present case on a first degree murder charge, as the State suggests, would be unconscionable.

Likewise, *State v. Campbell*, 95-1409 (La.3/22/96), 670 So.2d 1212 does not support allowing the State to retry the defendant on a first degree murder charge. In *Campbell*, the jury rendered an improper responsive verdict. The defendant was convicted of "attempted jury tampering." On appeal, his convictions and sentences were vacated. When defendant was charged with jury tampering, the

jury returned a verdict of attempted jury tampering. Attempted jury tampering was not a valid crime. The court concluded that it could not "say that the jury's return of the purportedly lesser verdicts of attempt necessarily and implicitly acquitted [defendant] of any material element of the crime charged." Consequently, retrial of the defendant of the original charged offense of jury tampering with correct instructions was held not to constitute double jeopardy. The *Campbell* circumstances are not present in this case.

Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003) is easily distinguishable for the present case and does not support allowing the State to retry Langley on a first degree murder charge after his successful appeal of his second degree murder conviction. The issue in *Sattazahn* was *not* whether the State could retry the defendant on first degree murder charges after his conviction was reversed on the same charges. *Sattazahn* decided the sentence enhancement of death as opposed to the life sentence he received from the first conviction. Thus, the *Sattazahn* court was faced with the issue of whether double jeopardy applied to capital *sentencing* proceedings. In *Sattazahn*, the defendant did not attack his conviction of first degree murder, but the fact that on retrial, he was subject to the peril of receiving the death penalty. It is clear that the constitution does not limit the imposition of a harsher sentence after conviction upon retrial. *See North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). However, that harsher sentence must be for the *same* offense, not for a harsher offense for which one has been acquitted by virtue of being found guilty of a lesser included offense. *See* La.Code Crim.P. art. 598.

State v. Self, 00-633 (La.App. 3 Cir. 11/2/00), 772 So.2d 337 did conclude that the double jeopardy provision of the Fifth Amendment does not bar retrial of the defendant. However, the issue of whether any *other* constitutional provisions or protections, such as Article 1, § 19 of the Louisiana Constitution, would bar retrial on the original charge was not discussed as it was in *State v. Goodley.*

State v. Williams, 00-1725 (La.11/28/01), 800 So.2d 790 referred to the correction of an illegal sentence and involved increased *punishment.* The possibility of an increased punishment upon remand is constitutionally permissible, according to *North Carolina v. Pearce. Williams* did not refer to remand for retrial on a more severe charge than that for which one was convicted. In *State v. Norman,* 34,868 (La.App. 2 Cir. 10/31/01), 799 So.2d 619, the court concluded that double jeopardy does not preclude retrial on the *same* charge. To find the defendant guilty of both theft and illegal possession of stolen goods would be double jeopardy. However, double jeopardy did not prevent retrial on either charge. Hence, the retrial must be on the *same* charge for which the defendant was convicted or on a lesser charge.

For the foregoing reasons, I respectfully concur in part and dissent in part.

OPPOSITION BRIEF

ORIGINAL

Supreme Court, U.S.
FILED
SEP 19 2007
OFFICE OF THE CLERK

No. 07-225

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF LOUISIANA,

Petitioner,

V.

RICKY JOSEPH LANGLEY,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[X] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court in respect of this proceeding.

Petitioner has, however, been determined to be indigent throughout the entirety of these criminal proceedings and counsel is appointed.

Petitioner 's affidavit or declaration in support of this motion is attached hereto.

Christine Lehmann /pp ltr.

* PHYLLIS MANN
La. Bar No. 23419
CHRISTINE LEHMANN
La. Bar No. 28122
Louisiana Capital Assistance Center
636 Baronne Street
New Orleans, La. 70113
(504) 558-9867

Counsel for Ricky Langley
*Member, Supreme Court Bar

RECEIVED
SEP 17 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Ricky Langley, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$	$	$
Self-employment	$ 0	$	$	$
Income from real property (such as rental income)	$ 0	$	$	$
Interest and dividends	$ 0	$	$	$
Gifts	$ 40.00	$	$	$
Alimony	$ 0	$	$	$
Child Support	$ 0	$	$	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$	$
Disability (such as social security, insurance payments)	$ 0	$	$	$
Unemployment payments	$ 0	$	$	$
Public-assistance (such as welfare)	$ 0	$	$	$
Other (specify):	$ 0	$	$	$
Total monthly income:	$ 40.00	$	$	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
_____	_____	_____	$_____
_____	_____	_____	$_____
_____	_____	_____	$_____

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
_____	_____	_____	$_____
_____	_____	_____	$_____
_____	_____	_____	$_____

4. How much cash do you and your spouse have? $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
_____	_____	$_____	$_____
_____	_____	$_____	$_____
_____	_____	$_____	$_____

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
_____	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ 0	$_____
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$_____
Home maintenance (repairs and upkeep)	$ 0	$_____
Food	$ 23.00	$_____
Clothing	$ 0	$_____
Laundry and dry-cleaning	$ 0	$_____
Medical and dental expenses	$ 0	$_____

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other: _____	$ 0	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ 0	$
Installment payments		
Motor Vehicle	$ 0	$
Credit card(s)	$ 0	$
Department store(s)	$ 0	$
Other: _____	$ 0	$
Alimony, maintenance, and support paid to others	$ 0	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify): _____	$ 0	$
Total monthly expenses:	$ 23.00	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 09/18, 2007

Ricky Langley
(Signature)

2

3-19-07

No. 07-225

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF LOUISIANA,

Petitioner,

V.

RICKY JOSEPH LANGLEY,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

---

* PHYLLIS MANN
La. Bar No. 23419
CHRISTINE LEHMANN
La. Bar No. 28122
Louisiana Capital Assistance Center
636 Baronne Street
New Orleans, La. 70113
(504) 558-9867

Counsel for Ricky Langley
*Member, Supreme Court Bar

TABLE OF CONTENTS

TABLE OF AUTHORITIES III

STATEMENT OF THE CASE 1

COURSE OF PROCEEDINGS BELOW 1

REASONS FOR REFUSING TO GRANT THE WRIT 3

I. THE PETITION DOES NOT PROVIDE ANY COMPELLING REASON FOR A GRANT OF THE WRIT 3

A. The Louisiana Supreme Court's decision rests independently on state law 3

B. There is no circuit split, split between state and federal superior courts or even between state courts of last resort 4

C. Petitioner has maintained inconsistent positions on the questions at issue in this case both by failing to object in the trial court and by maintaining the diametrically opposite position on the law while on direct appeal 5

II. THE LOUISIANA SUPREME COURT CORRECTLY IDENTIFIED AND APPLIED DOUBLE JEOPARDY PRINCIPLES 5

A Double jeopardy clearly bars a retrial on a greater offense when a defendant is convicted of a lesser included offense only and that conviction is overturned on appeal 5

B. Even if what occurred was structural error, Double Jeopardy would still bar a retrial on the offense for which Mr. Langley was acquitted 6

PRAYER FOR RELIEF 7

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

Cases

Benton v. Maryland, 395 U.S. 784 (1969);..... 6
Ex parte Gillentine, No. 1051370, 2007 Ala. LEXIS 184 (Ala. September 6, 2007)..... 5
Fong Foo v. United States, 369 U.S. 141 (1962)..... 7
Green v. United States, 355 U.S. 184 (1957)..... 6
Moody v. State, 931 So. 2d 177 (Fla. Dist. Ct. App. 2006)..... 5
Sanabria v. United States, 437 U.S. 54 (1978)..... 7
State v. Langley, 896 So. 2d 200 (La. App. 3 Cir. 2004)..... 2, 3, 5
State v. Langley, 958 So. 2d 1160 (La. 2007)..... 3, 4, 6

Statutes

La. C. Cr. P. art.598(A) 4

STATEMENT OF THE CASE

Respondent, Ricky Langley, was tried in Calcasieu Parish, Louisiana before a jury of twelve on one count of first-degree murder. Mr. Langley entered a dual plea of not guilty and not guilty by reason of insanity. The jury returned a verdict of guilty of the lesser included offense of second degree murder. Under Louisiana and Federal law this constitutes an acquittal of the count of first degree murder.

On appeal, Mr. Langley's second degree murder conviction was overturned and he was remanded for retrial. Consistent with Louisiana law and federal constitutional principles, the Louisiana Supreme Court has now ruled that Mr. Langley may not be retried on the count of first degree murder as he has been acquitted on this count.

The decision of the Louisiana Supreme Court in this case is unquestionably correct. It is based on both state and federal law and any decision by this court would not impact the independent basis for the decision under state law. In any event, the court's decision is wholly consistent with federal law.

The state's position is based on a statement in dicta by an intermediate appellate judge which has confused the significance of structural error under double jeopardy principles with the law relating to jurisdictional defect.

COURSE OF PROCEEDINGS BELOW

Mr. Langley was indicted on April 11, 2002 on one count of first degree murder.[1] The trial began on April 21, 2003 and the state sought the death penalty. During the course of the trial, the trial judge absented himself from the bench on a number of occasions, most particularly, during a segment of voir dire and for most of the closing arguments.

On May 16, 2003, the jury acquitted Mr. Langley of first-degree murder, but found him guilty of second-degree murder. He was sentenced to the mandatory term of life imprisonment without the possibility of parole.

Mr. Langley appealed his second degree murder conviction, arguing *inter alia*, that the judge's absence from the bench constituted error and that it should be regarded as structural error. The state conceded that the trial judge had erred but argued that the absence of the trial judge was subject to harmless error analysis.[2] On December 9, 2004 the Court of Appeals held that the trial judge's absences introduced structural error into the proceedings, Mr. Langley's second degree murder conviction was reversed and the case was remanded for new trial. State v. Langley, 896 So. 2d 200 (La. App. 3 Cir. 2004).

In Part VI of the opinion, Judge Decuir went on to offer an advisory opinion as to the future prosecution of the case. While this *dicta* was joined by Woodard, J., the other panel judge Thibodeaux C.J. vehemently dissented, describing this Part of the opinion as both advisory and ill-advised. Langley, 896 So. 2d at 212-13 (Thibodeaux, C.J., dissenting in part and concurring in part). Certainly, the potential re-prosecution of Mr. Langley for first degree murder was not raised by any assignment of error, was not properly before the court and the court did not have the advantage of any briefing on the question before issuing its advisory opinion.

In Part VI Judge Decuir reasoned that as the trial judge's absence was structural error, the trial and resulting verdict were an absolute nullity and as a result there was no double jeopardy bar to reprosecution on first degree murder. Thibodeaux C.J. dissented from this Part of the opinion, holding that double jeopardy protections barred the reprosecution.

The state did not make an application for writ of certiorari to the Louisiana Supreme Court on the finding of structural error or the reversal of the second degree murder conviction.

The state sought to reprosecute Mr. Langley for first degree murder but the trial court granted a

---

[1] An earlier indictment had been quashed as a result of racial discrimination in the selection of the grand jury.

[2] The state also argued that the defendant had failed to contemporaneously object but the Court of Appeal ruled that "defense counsel had little opportunity, if any, to object before the judge left the courtroom. When the arguments were concluded, defense counsel lodged a general objection to the judge's absence and listed specific objections to

motion to quash the first degree murder indictment, holding that the reprosecution was barred by the protection against double jeopardy.

The state sought interlocutory writs on this issue, filing in Louisiana's Third Circuit Court of Appeal. A two judge majority declined to review the merits of the double jeopardy issue, holding that the earlier opinion of Decuir J. established the "law of the case" and that both the Third Circuit and the trial court were bound by that opinion. The third, dissenting, judge held that the law of the case did not apply and, reaching the merits, agreed with the trial judge that double jeopardy barred the reprosecution.

Mr. Langley filed an application for writ of certiorari in the Louisiana Supreme Court. The application was granted and following briefing and oral argument[3] the Louisiana Supreme Court reversed the appellate court and reinstated the ruling of the trial court. State v. Langley, 958 So. 2d 1160 (La. 2007). While the issue was not directly before the court for review, the Louisiana Supreme Court determined that the error at hand was trial error, rather than structural error. Applying the relevant provision in Louisiana's Code of Criminal Procedure, the court found that the reprosecution was barred. Id. at 1170. The Court also expressly refused to adopt the proposition that structural error is the functional equivalent of a jurisdictional defect such that it renders proceedings absolutely null. Id. at n.7.

REASONS FOR REFUSING TO GRANT THE WRIT

I. THE PETITION DOES NOT PROVIDE ANY COMPELLING REASON FOR A GRANT OF THE WRIT

A. The Louisiana Supreme Court's decision rests independently on state law

Under Louisiana's Code of Criminal Procedure, a finding of guilt of a lesser included offense serves as an acquittal of all greater offenses charged in the indictment and the defendant cannot be retried

---

the content of the prosecutor's argument." State v. Langley, 896 So. 2d 200, 206 (La. App. 3 Cir. 2004).

[3] The court also received amicus briefs in support of Mr. Langley's position from the Louisiana Association of Criminal Defense Lawyers and the American Civil Liberties Union.

on the greater offenses at any new trial. La. C. Cr. P. art. 598(A). This provision was the express basis for the Louisiana Supreme Court's decision to reverse the court of appeals and reinstate the trial court's order barring reprosecution for first degree murder:

> Even though the trial error requires a reversal of Langley's conviction and sentence, the verdict rendered by the jury was a legal verdict and should be given effect pursuant to La. C.Cr.P. art. 598(A):
>
> > When a person is found guilty of a lesser degree of the offense charged, the verdict or judgment of the court is an acquittal of all greater offenses charged in the indictment and the defendant cannot thereafter be tried for those offenses on a new trial.
>
> Consequently, the state is limited in any subsequent prosecution to re-indicting the defendant on a charge of second degree murder.

Langley, 958 So. 2d at 1170.

While having regard to federal principles relating to structural error and ordinary trial error, it is clear that the Louisiana Supreme Court reached the conclusion that under Louisiana law, notwithstanding the trial judge's error, the verdict of the jury was to be given effect under art. 598(A), Louisiana Code of Criminal Procedure and reprosecution for first degree murder was barred.

This court should not grant certiorari to consider a decision that rests on state law.

B. There is no circuit split, split between state and federal superior courts or even between state courts of last resort

While not an exclusive list, this Court has given guidance as to the types of cases suitable for a grant of certiorari. Those are cases where "compelling reasons" exist for the grant of the writ and where there are splits between the circuit courts of appeal, between the federal and state courts or between state courts of last resort.

There is no circuit split or any other split created by the decision of the Louisiana Supreme Court. First, the court's decision is consistent with federal law and this Court's precedent. Second, the two other state court's that have considered the reasoning in the Court of Appeals' advisory opinion have come to the same conclusion as the Louisiana Supreme Court, expressly disapproving the decision. Ex parte Gillentine,

No. 1051370, 2007 Ala. LEXIS 184 (Ala. September 6, 2007); Moody v. State, 931 So. 2d 177 (Fla. Dist. Ct. App. 2006).

C. Petitioner has maintained inconsistent positions on the questions at issue in this case both by failing to object in the trial court and by maintaining the diametrically opposite position on the law while on direct appeal

Petitioner here did not object to the absence of the trial judge during trial. Petitioner vehemently argued on direct appeal that any error created by the absence of the trial court was harmless. When the court of appeal ruled that the error was structural and reversed Mr. Langley's second degree murder conviction, Petitioner chose not to seek review of that determination in the Louisiana Supreme Court. Petitioner's first submission to the effect that reprosecution on first degree murder might be possible came during oral argument on direct appeal when the state realized it was losing. Langley, 896 So. 2d at 212 (Thibodeaux dissenting)("The consequences of a reversal was addressed at oral argument only when, somewhat presciently, the State determined that its position was quite tenuous.")

Petitioner has opportunistically adopted the advisory opinion of Judge Decuir and now argues that not only is the absence of the judge not harmless error, not only is it actually structural error but that it renders the whole trial a nullity and that this principle is so clear and of such surpassing importance that this court should grant the state's writ application.

II. THE LOUISIANA SUPREME COURT CORRECTLY IDENTIFIED AND APPLIED DOUBLE JEOPARDY PRINCIPLES

A. Double jeopardy clearly bars a retrial on a greater offense when a defendant is convicted of a lesser included offense only and that conviction is overturned on appeal

The Louisiana Supreme Court correctly identified and applied the principles of double jeopardy in this case:

> The Fifth Amendment of the U.S. Constitution provides that "no person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." As its principal protection, this prohibition against double jeopardy prohibits the State from prosecuting a defendant twice for the same crime in cases in which the defendant has been acquitted in the first trial. *Benton v. Maryland*, 395 U.S. 784, 796, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969); *Green v. United States*, 355 U.S. 184, 188, 78 S. Ct. 221, 223, 2 L. Ed. 2d 199, 77 Ohio Law Abs. 202 (1957). In *Green*, the Supreme Court held that when a defendant is convicted of a lesser included offense and that conviction is overturned on appeal, the conviction operates as an implied acquittal of the charged crime, prohibiting the State from retrying the defendant on the original charge. *Id.*, 355 U.S. at 193, 78 S. Ct. at 226-227 (the prohibition against double jeopardy prohibits a defendant from having to "barter his constitutional protection against a second prosecution" for the charged crime "as the price of a successful appeal from an erroneous conviction" on the lesser offense). The Louisiana Constitution contains a similar guarantee in Article 1, § 15.

State v. Langley, 958 So. 2d 1160, 1169 (La. 2007).

The Court confirmed that the prosecution was commenced by indictment, the court had subject matter over the felony proceedings and otherwise had personal jurisdiction over Mr. Langley. Id. at 1169-70.

Given the finding that the judge's absence was trial error, there was no reason as a matter of federal constitutional law why ordinary double jeopardy principles would not apply and bar the reprosecution of Mr. Langley for the capital offense of which he was acquitted.

B. Even if what occurred was structural error, Double Jeopardy would still bar a retrial on the offense for which Mr. Langley was acquitted.

In determining that the error present here was trial error, rather than structural error, the Louisiana Supreme Court had regard to the relevant principles of federal constitutional law, accurately citing relevant decisions from this Court. Id. at 1167-8.

However, even if the error here should in fact be regarded as structural error, this would not change the outcome of the application of Double Jeopardy principles.

This Court has repeatedly and unequivocally held that Double Jeopardy bars retrial regardless of how egregious the error in the trial court:

> The only question remaining is whether any of the exceptions to the constitutional rule forbidding suc[illegible]ve trials on the same offense, see n. 15, supra, apply here. The short answer to this q[illegible]on is that there is no exception permitting retrial once the defendant has been acquitted, no matter how "egregiously erroneous," *Fong Foo v. United States*, 369 U.S., at 143, the legal rulings leading to that judgment might be.

Sanabria v. United States, 437 U.S. 54, 75 (1978).

This Court has never held that a trial vitiated by structural error is the equivalent of a complete lack of jurisdiction for the purposes of Double Jeopardy and any such rule would be nonsensical. In almost every case where structural error is discussed, the first example of a structural error that is given is the complete deprivation of counsel for a criminal defendant. Under Petitioner's theory, a defendant deprived of counsel who is fortunate enough to obtain an acquittal could nevertheless be retried for and convicted of the same offense despite the prohibition on Double Jeopardy because the original trial was afflicted by structural error.

As the Louisiana Supreme Court recognized in its analysis, structural error is a classification relating to the ability of a reviewing court to weigh and determine harm arising from a constitutional violation in a specific case. It is unrelated to the concepts of nullity and jurisdictional defect and is of no significance in a double jeopardy analysis.

PRAYER FOR RELIEF

Based upon the foregoing, Mr. Langley prays that this Court deny the state's Petition for certiorari.

Respectfully submitted,

Christine Lehmann // pp SK

* PHYLLIS MANN
La. Bar No. 23419
CHRISTINE LEHMANN
La. Bar No. 28122
Louisiana Capital Assistance Center
636 Baronne Street
New Orleans, La. 70113

(504) 558-9867

Counsel for Ricky Langley
*Member, Supreme Court Bar

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing upon the opposing party by mailing a copy of same to:

Carla Sigler
Assistant District Attorney
1020 Ryan Street
Lake Charles LA 70601
Tel: (337) 437-3400

This the 19th day of September, 2007.

Laura J. Knosby

Louisiana
Capital
Assistance
Center

A Non-Profit Law Office

September 19, 2007

William K. Suter
Clerk of Court
Supreme Court of the United States
Washington, DC 20543

Re: State of Louisiana v. Ricky Langley, No. 07-225

Dear Mr. Suter:

Please find attached the original and ten copies of an Opposition to Petition for a Writ of Certiorari in the case of State v. Langley.

Please call if there are any questions or problems.

Sincerely,

Christine Lehmann /pp lfk
Christine Lehmann
Counsel for Ricky Langley

Enc.

Cc: Carla S. Sigler, Assistant District Attorney, Calcasieu Parish District Attorney's Office
G. Benjamin Cohen, Louisiana Association of Criminal Defense Lawyers
John Howard Holdridge, American Civil Liberties Union
Ellis Paul Adams, Jr., Louisiana District Attorneys Association

RECEIVED
SEP 21 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

LOUISIANA CAPITAL ASSISTANCE CENTER
636 BARONNE STREET • NEW ORLEANS • LOUISIANA • 70113
PHONE + 1 (504) 558-9867 • FAX: + 1 (504) 558-0378